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No. 548

In the Supreme Court of the United States

OCTOBER TERM, 1952

HARRY RENTON BRIDGES, HENRY SCHMIDT, AND J. R. ROBERTSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	6
A. The naturalization proceedings	7
B. Recruitment of Bridges into the Communist Party	11
C. The participation of Bridges in Communist activities during the 1930's	14
D. The Communist Central Committee	16
E. Other Communist activity in the 1940's	18
Summary of argument	20
Argument:	
I. The prosecution is not barred by the statute of limitations	26
A. The Suspension Act is applicable	27
1. The Suspension Act is applicable to Count II of the indictment	32
(a) The offense of obtaining citizenship by means of a false statement involves fraud against the United States	32
(b) The Suspension of Limitations Act is not limited in application to pecuniary frauds or war frauds	38
2. The Suspension Act is applicable to Count I	44
3. The Suspension Act is applicable to Count III of the indictment	50
B. Section 21 of the Act of June 25, 1948, revising the Criminal Code, saved the five-year statute of limitations in the Nationality Act of 1940 for offenses here involved in Counts II and III	52
1. The basic purpose of the saving provision is to preserve the status quo on earlier offenses	54
2. Statutes of limitations are to be construed prospectively unless a contrary intent clearly appears	57

251676 53 1

Argument—Continued Page

3. This Court and the Courts of Appeals have applied the language used in Section 21 to provisions other than those defining substantive rights 61

4. The language of the 1948 revision does not indicate a Congressional intent to have the statute of limitations operate retrospectively 65

II. The indictment is not barred as to petitioner Bridges under the principles of res judicata, estoppel, or the due process provision of the Fifth Amendment 71

A. There is no final binding adjudication of fact in the deportation proceedings 74

B. The naturalization decree in 1945 is not conclusive of any issues in the present proceedings 85

C. The indictment was not barred by the Fifth Amendment 89

Conclusion 92

CITATIONS

Cases:

Bigelow v. *Old Dominion Copper Co.*, 225 U. S. 111 85

Brenci v. *United States*, 175 F. 2d 90 33

Bridges v. *Wixon*, 144 F. 2d 927, *reversed*, 326 U. S. 135 ..... 24, 72, 73, 76, 77, 78, 82

Bridges, Ex parte, 49 F. Supp. 202 76

Carlson v. *Landon*, 342 U. S. 524 83

Churchill Tabernacle v. *Federal Communications Commission*, 160 F. 2d 244 81

Collins v. *Loisel*, 262 U. S. 426 78

Commissioner v. *Sunnen*, 333 U. S. 591 ..... 25, 74, 85, 89

Cromwell v. *County of Sac*, 94 U. S. 351 85

Curley v. *United States*, 130 Fed. 1, certiorari denied, 195 U. S. 628 35

Danebo Lumber Co. v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, certiorari denied, 340 U. S. 830 ..... 44, 49

De La Rama Steamship Co. v. *United States*, 344 U. S. 386 ..... 62, 65

Del Guercio v. *Pupko*, 160 F. 2d 709 33

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 80

Federal Trade Commission v. *Motion Picture Advertising Co.*, 344 U. S. 392 74

Federal Trade Commission v. *Raladam Co.*, 316 U. S. 149 84

Flynn ex rel. Ham Lop Wong v. *Ward*, 95 F. 2d 742 82

Fong Yue Ting v. *United States*, 149 U. S. 698 82

Furrow v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, certiorari denied, 340 U. S. 830 ..... 44, 49

Cases—Continued

	Page
Glasser v. United States, 315 U. S. 60	22, 45, 50
Grandview Dairy v. Jones, 157 F. 2d 5, certiorari denied, 329 U. S. 787	81
Great Northern Railway Co. v. United States, 208 U. S. 452	64
Grin v. Shine, 187 U. S. 181	38
Haas v. Henkel, 216 U. S. 462	35, 38, 39
Hallowell v. Commons, 239 U. S. 506	64
Hammerschmidt v. United States, 265 U. S. 182	43
Harisiades v. Shaughnessy, 342 U. S. 580	25, 82, 90
Harris v. Biszkowicz, 400 F. 2d 854	78
Haruichi Yoshihara v. Carmichael, 115 F. 2d 110	33
Hazel-Atlas Co. v. Hartford Co., 322 U. S. 238	88
Heikkila v. Barber, 345 U. S. 229	83
Hertz v. Woodman, 218 U. S. 205	64
Hiatt v. Hilliard, 180 F. 2d 453	63
Hoiness v. United States, 335 U. S. 297	61–62
Home Loan Bank Board v. Mallonee, 196 F. 2d 336	81
Johannessen v. United States, 225 U. S. 227	88
Keokuk and Western R. Co. v. Missouri, 152 U. S. 301	85
Kessler v. Strecker, 307 U. S. 22	75, 78
Klapprott v. United States, 335 U. S. 601	89
Knauer v. United States, 328 U. S. 654	21, 25, 33, 34, 88
Lovely v. United States, 175 F. 2d 312, certiorari denied, 338 U. S. 834	63
Maney v. United States, 278 U. S. 17	88
Marzani v. United States, 168 F. 2d 133, affirmed, 335 U. S. 895, 336 U. S. 922	21, 31, 42
Miller v. United States, 24 F. 2d 353, certiorari denied, 276 U. S. 638	21, 42, 43, 48
Morse v. United States, 267 U. S. 80	78
National Labor Relations Board v. Baltimore T. Co., 140 F. 2d 51, certiorari denied, 321 U. S. 795	81
National Rifle Association of America v. Young, 134 F. 2d 524	81
Pearson v. Williams, 202 U. S. 281	24, 83
People v. Driessen, 178 Mich. 118, 144 N. W. 526	57
Pinkerton v. United States, 328 U. S. 640	73
Quirk v. United States, 161 F. 2d 138	69
Russell v. United States, 278 U. S. 181	59, 69
Schneiderman v. United States, 320 U. S. 118	87
Schwinn v. United States, 112 F. 2d 74, affirmed, 311 U. S. 616	33
Segal v. Travelers Insurance Co., 94 F. Supp. 423	84
Sekov Corp. v. United States, 139 F. 2d 197	84
Spencer v. Railroad Retirement Board, 166 F. 2d 342	81
Stillman v. United States, 177 F. 2d 607	69
Stone v. Stone, 136 F. 2d 761	30

Cases—Continued

	Page
Tutun v. United States, 270 U. S. 568	88
United States v. Roncon Brass Co., 344 U. S. 43	36
United States v. Chop Kum, 91 F. Supp. 769	33
United States v. Cohn, 270 U. S. 339	35, 38
United States v. Falter, 23 F. 2d 420	48
United States v. Gilliland, 312 U. S. 86	35
United States v. Gottfried, 165 F. 2d 360, certiorari denied, 333 U. S. 860	21, 43
United States v. Grainger, Nos. 634, 635, and 636, Oct. Term, 1952	38
United States v. Kirby, 176 F. 2d 101	63
United States v. La Societe Francaise De Bien. Mut., 152 F. 2d 243, certiorari denied, 327 U. S. 793	81
United States v. McElvain, 272 U. S. 633	31, 47
United States v. Noveck, 271 U. S. 201	21, 29, 31, 32, 36, 37, 38, 47
United States v. Obermeier, 186 F. 2d 243, certiorari denied, 340 U. S. 951	22, 31, 36, 56, 63, 66
United States v. Oppenheimer, 242 U. S. 85	23, 56, 60, 70
United States v. Reisinger, 128 U. S. 398	68-69
United States v. Saracino, 43 F. 2d 75	34
United States v. Scharton, 285 U. S. 518	31, 37
United States v. Smith, 342 U. S. 225	44
United States v. St. Louis, San Francisco & Texas Ry. Co., 270 U. S. 1	23, 57
United States v. Sotne & Downer Co., 274 U. S. 225	80, 90
United States v. Ulrici, 28 Fed. Cas. p. 328, No. 16,594, 3 Dillon 532	69
United States v. Willard Tablet Co., 141 F. 2d 141	84
United States v. Williams, 341 U. S. 58	26, 73, 74, 89, 91
United States ex rel. Hassell v. Mathues, 27 F. 2d 137	57
United States ex rel. Jankowski v. Shaughnessy, 186 F. 2d 586	33
United States ex rel. Lamp v. Corsi, 61 F. 2d 964	33
United States Fidelity & Guaranty Co. v. United States for the use of Struthers Wells Co., 209 U. S. 306	58, 69
Wallace Corp. v. National Labor Relations Board, 323 U. S. 248	80, 84
Weinhandler v. United States, 20 F. 2d 359	38
Wilbur v. United States ex rel. Kadrie, 281 U. S. 206	83
Wong Chow Gin v. Cahill, 79 F. 2d 854	82

Statutes:

Act of February 10, 1939, 53 Stat. 1a (codifying Title 26 as the Internal Revenue Code), Sec. 4 (d)	56
Act of June 28, 1940, 54 Stat. 673, 8 U. S. C. 137	75
Act of July 30, 1947, 61 Stat. 633, 640, Sec. 2	67
Act of June 25, 1948, 62 Stat. 683 (revising 18 U. S. C.), Sec. 21	4, 53, 56, 61, 70, 71

Statutes—Continued Page
Criminal Code, 1909 revision, 35 Stat. 1159, Secs. 343, 344 55
Criminal Code, 1946 ed.:
Sec. 35 (A) 36
Sec. 37, 18 U. S. C. 88 2, 27, 38, 45
Sec. 125 36
18 U. S. C. 550 51
18 U. S. C. 590a 55
Criminal Code, 1948 rev.:
18 U. S. C. 2 51
18 U. S. C. 371 2, 45
18 U. S. C. 1015 (a) 3, 6
18 U. S. C. 1425 31
18 U. S. C. 1621 36
18 U. S. C. 3282 5, 26, 68
18 U. S. C. 3287 5, 26, 27, 39
D. C. Code 30–103 30
Nationality Act revision of 1906, 34 Stat. 603, Sec. 25 55
Nationality Act revision of 1918, 40 Stat. 542, 547, Sec. 2 55
Nationality Act of 1940, c. 876, 54 Stat. 1137, 8 U. S. C. 501, *et seq.*:
Secs. 301–341 (8 U. S. C. 701–741) 87
Sec. 305 (8 U. S. C. 705) 87
Sec. 307 (8 U. S. C. 707) 87
Sec. 338 (8 U. S. C. 738) 34
Sec. 346 (a) (8 U. S. C. 746 (a)) 6
Sec. 346 (a) (1) (8 U. S. C. 746 (a)) 3, 28, 37, 46, 52
Sec. 346 (a) (5) (8 U. S. C. 746 (a) (5) 4, 28, 50, 52
Sec. 346 (d) (8 U. S. C. 746 (d)) 4
Sec. 346 (g) (8 U. S. C. 746 (g)) 4, 52
Sec. 347 (8 U. S. C. 747) 55
Revised Statutes of 1874:
Sec. 5598 55, 65
Sec. 5599 55, 65
1 U. S. C. 109 64, 70
1 U. S. C. 110 66
Wartime Suspension of Limitations Act, 18 U. S. C. (Supp. V), Sec. 3287 5, 26, 27, 39
Miscellaneous:
Black's *Law Dictionary* (3d ed.), p. 813 33
Bridges, Harry, In re Deportation Proceedings before the Attorney General (May 28, 1942) 81
Davis, *Administrative Law*, pp. 563–613 82
12 Fed. Reg. 1 5, 26
1 Freeman, *Judgments* (5th ed., 1925), Sec. 407 72
H. Rep. 304, 80th Cong. 67
H. Rep. 1789, 59th Cong., 1st Sess., p. 2 35
H. Rep. No. 2051, 77th Cong., 2d Sess. 41

Miscellaneous—Continued

	Page
H. Rep. 1205, 72d Cong., 2d Sess.	66
Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 Wisconsin Law Rev. 5–42, 198–235	82
Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 5	85
S. Rep. No. 1544, 77th Cong., 2d Sess.	41
Webster's *New International Dictionary* (2d ed., 1934), 1003	33

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OPINIONS BELOW

The opinion of the Court of Appeals, as amended on denial of rehearing (R. 8354–8433), is reported at 199 F. 2d 811. The opinion of the United States District Court for the Northern District of California denying a series of motions to dismiss the indictment (R. 10–41) is reported at 86 F. Supp. 922. The opinion of that court on the issue of *res judicata* raised during the trial is reported at 87 F. Supp. 14.[1]

[1] See also opinions on revocation of bail after judgment, 93 F. Supp. 989, reversed, 184 F. 2d 881.

JURISDICTION

The judgment of the Court of Appeals was entered on September 6, 1952 (R. 8296). A petition for rehearing was denied on November 18, 1952 (R. 8434). On November 28, 1952, the time for filing a petition for a writ of certiorari was extended to January 16, 1953, by order of Mr. Justice Douglas. The petition was filed January 14, 1953 and granted on March 9, 1953 (R. 8437). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the fact that two previous attempts to deport an alien because of alleged communist activity have failed and that a court has entered a decree granting him naturalization precludes a prosecution relating to false statements in the alien's naturalization proceedings with respect to membership in the Communist Party.

2. Whether the prosecution is barred by the statute of limitations.

STATUTES INVOLVED

1. Count one of the indictment is based on Section 37 of the Criminal Code, 18 U. S. C. [1946 ed.] 88, in effect at the time the offenses were committed (now 18 U. S. C. [1948 rev.] 371). It provided:

> If two or more persons conspire either to commit any offense against the United

States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

2. Counts two and three are based on Section 346 of the Nationality Act of 1940, c. 876, 54 Stat. 1137, 8 U. S. C. 746, which was in effect at the time of the offenses. It provided in pertinent part as follows:

> (a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> (1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.[2]
>
> * * * * * *

[2] Repealed and superseded by 18 U. S. C. (1948 rev.) 1015 (a):

> Whoever knowingly makes any false statement under oath, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization, citizenship or registry of aliens; * * *
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(5) To encourage, aid, advise, or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship or other documentary evidence of naturalization or of citizenship—

a. Knowing the same to have been procured by fraud; * * *

* * * * *

(d) Any person violating any provision of subsection (a) of this section shall be fined not more than $5,000, or imprisoned not more than five years, or both.

* * * * *

(g) No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime.

3. On September 1, 1948, prior to the return of the indictment on May 25, 1949, the 1948 revision of Title 18, U. S. C., became effective. Section 21 of the Act revising Title 18 (June 25, 1948, 62 Stat. 683) provides:

> The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.

Among the sections so repealed were Section 346 (a) (1) and (a) (5) of the Nationality Act, *supra*, upon which counts two and three were based, and also subsection (g) of the same section, the special five-year limitation provision incorporated into that same section which also defines the various crimes under the Act.

4. Section 3282 of the 1948 revision of Title 18 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

5. 18 U. S. C. (1948 rev.) 3287 reads in part as follows:

> *Wartime suspension of limitations.* When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.[3]

---

[3] The President proclaimed the termination of hostilities on December 31, 1946. 12 F. R. 1.

This section appeared in substantially the same form at 18 U. S. C. 590a before the 1948 revision.

STATEMENT

On May 25, 1949, an indictment in three counts was returned against the petitioners in the United States District Court for the Northern District of California. Count one charged all three petitioners with conspiracy to defraud the United States in the proper administration of its naturalization laws by having Harry Bridges fraudulently petition for and obtain naturalization and by fraudulently representing, in the proceedings for the naturalization of Bridges, that he had never belonged to the Communist Party of the United States. The second count charged Bridges alone with the crime of knowingly making a false statement under oath relating to his naturalization proceedings, in violation of 8 U. S. C. (1946 ed.) 746 (a), now 18 U. S. C. 1015 (a). The third count charged the other petitioners with fraudulently aiding, advising, and assisting Bridges to procure naturalization in violation of 8 U .S. C. (1946 ed.) 746 (a). (R. 3–8.) After a trial by jury, petitioners were found guilty on the counts in which they were named (R. 8036–8038) and sentenced as follows: Bridges to two years on count I and five years on count II, the sentences to run concurrently; each of the other petitioners to two years imprisonment on counts I and III, the sentences to run concurrently (R. 235–240). After judgment was entered, the citizenship of Bridges was revoked under Section

338 (e) of the Nationality Act of 1940, 8 U. S. C. (1946 ed.) 738 (e). On appeal the conviction was affirmed (R. 8296).

A. THE NATURALIZATION PROCEEDINGS

At the trial, the Government proved that on June 23, 1945, petitioner Bridges went to the office of the Immigration and Naturalization Service in San Francisco and there filed an application for a Certificate of Arrival and a Preliminary Form for Petition for Naturalization (R. 449–450, 469, Gov. Ex. 1). On his application form (Gov. Ex. 1) he indicated that the two prospective witnesses for his naturalization would be Paul Schnur and Henry Schmidt. In a discussion with petitioner Robertson and others in the Bridges defense committee office, Bridges had indicated that he was going to use these two men as his naturalization witnesses (R. 4651–4652).

Pursuant to written instructions to appear before an examiner for preliminary examination and to bring his witnesses, on August 8, 1945, Bridges appeared before the naturalization deputy, Garner (R. 451, 454). Petitioner Robertson accompanied Bridges, his attorney, and his proposed witnesses, and waited outside the hearing room (R. 462–463, 4606). After swearing Bridges in, Garner questioned him about various facts called for by the application form. Garner then called for his two naturalization witnesses. (R. 451–452, 461.)

Petitioner Schmidt was the first witness. He swore that he had known Bridges since about 1932 or 1933, that he saw him at least once a month or oftener in connection with their business, and that both he and Bridges were officers of the International Longshoremen's and Warehousemen's Union. On being asked if either he or Bridges was a Communist or a member of the Communist Party, Schmidt answered "no" to both questions. (R. 456–459, 468–469, 487–490, Gov. Ex. 2.)

Schmur was next sworn in but he was not acceptable as a witness because of lack of evidence of citizenship. At this juncture petitioner Robertson, who had accompanied Bridges to the hearing room, substituted as a witness for Bridges. He testified that he had known Bridges since about 1934, that both were ILWU officers and saw each other frequently, and that neither he nor Bridges was a member of the Communist Party. He also stated that in his opinion the applicant was qualified for citizenship, and was attached to the principles of the Constitution as required by law. (R. 459–464, Gov. Ex. 2.)

The petition was typed up in triplicate and signed by Bridges (R. 454, 455, 465). Petitioners Schmidt and Robertson signed the affidavit form on the reverse side of the petition and swore *inter alia*, that "I have personal knowledge that the petitioner is and during all such period [since

August 1, 1940] has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States."

On September 17, 1945, Bridges appeared before Judge Thomas Foley of the Superior Court in San Francisco for the naturalization hearing. Henry Schmidt and J. R. Robertson were both present in court as qualifying witnesses (R. 465–466). The certified and authenticated copy of the naturalization hearing was received in evidence as Government Exhibit No. 3 (R. 480; see also R. 133–145). Appellants Robertson and Schmidt testified that they had known Bridges for five years or longer; that he was a resident of the county at that time; that they vouched for his loyalty to the United States. They recommended him as a person of good moral character and recommended him to the court for citizenship. (R. 134.) In addition to other questions, the following question was asked Bridges and he gave the following answer (R. 138; see also Gov. Ex. 3):

> Q. Do you now, or have you ever, belonged to the Communist Party in the United States?
>
> A. I have not, I do not.

That answer is the foundation for count 2 of the indictment.

The following questions and answers thereto by Bridges were also adduced (R. 138–139; see also Gov. Ex. 3):

> Q. Do you now, or have you ever, belonged to any organization that advocated the overthrow of the government by force or violence?
>
> A. No.
>
> * * * * *
>
> Q. (By Mr. Garner): Have you ever been known, or used, any other name at any time?
>
> A. No.

After Garner had concluded his questioning of the witnesses and Bridges, a judgment admitting him to citizenship was entered (R. 552–553). Both Schmidt and Robertson remained in the court room until the proceedings were concluded (R. 4332, 4657).

The lengthy evidence adduced by the Government shows that over a long period of time prior to the naturalization proceedings Bridges had in fact been an active member of the Communist Party and was known to have been such by petitioners Robertson and Schmidt. This evidence may be summarized as follows:

B. RECRUITMENT OF BRIDGES INTO THE COMMUNIST PARTY

In 1933, there was a confused situation in the labor movement on the west coast waterfront, with different groups endeavoring to obtain dominance (R. 4101–4103; 4770–4775). The Communist Party decided to take an active part in this situation and to bolster an A. F. L. union, the International Longshoremen's Association, hereinafter referred to as the I. L. A. (R. 1247–1249). John Schomaker, a Government witness, testified that Sam Darcy, the district organizer of the Communist Party for District 13, which included California, asked him and Herman Mann, a unit organizer, who would be best as a leader for the Longshoremen's union. It was decided that petitioner Bridges was the best potential leader (R. 887–888, 957, 1247–1249). Schomaker and Mann visited petitioner Bridges at his home in late October 1933, and they discussed the revitalization of the I. L. A. (R. 732–736, 819–827).

Thereafter, Schomaker saw petitioner Bridges two or three times a week at his home, or another pre-arranged meeting place and occasionally going to or coming from the waterfront (R. 832–833). Some of these meetings were at Communist Party Headquarters at 37 Grove Street in San Francisco (R. 962–963). Bruce B. Jones was present at some of the meetings Schomaker had

with Bridges. Schomaker had known Jones since about 1931 and saw him at closed meetings of the Communist Party, *i. e.*, meetings restricted to members of the Communist Party. (R. 833–835.)[4]

One day during the winter of 1933, Schomaker and Jones had a meeting with Bridges in a restaurant in San Francisco (R. 835–837). On this occasion, Jones asked Bridges, "When are you going to join the Party, Harry?" Bridges said, "What about the name?" It was suggested that Bridges employ as a party name his mother's maiden name which was Dorgan (R. 469; see also R. 4717). After some conversation, Schomaker left the two other men for 15 or 20 minutes. (R. 839–841.) On his return, he joined Jones and they went to their headquarters of the San Francisco Communist Party. Jones showed Schomaker an application for membership in the Communist Party bearing the signature of Bridges which Schomaker recognized and could identify. (R. 841–853.) Jones and Schomaker arrived at 37 Grove Street and went into the office of Sam Darcy, the district organizer of District 13 (R. 853–854, 866.) Jones thereupon turned Bridges' application for membership in the Communist

[4] Jones testified as a defense witness that he had been a member of the Communist Party since the middle of 1932 (R. 3811). He was also a member of the Marine Workers Industrial Union and met Schomaker at the MWIU Hall (R. 3811).

Party over to Sam Darcy (R. 863–864, 1224).

Schomaker testified that he saw Bridges on numerous occasions pay his Communist Party dues in accordance with the normal Party practice to the unit secretary[5] (R. 873–874). He saw him pay dues to Herman Mann, Norma Perry, and J. C. Clark, who were unit secretaries at various times (R. 874–875).

In December 1935, after Schomaker had become a section organizer of the waterfront section of the Communist Party (R. 871), Bridges gave Schomaker his Communist Party book to be "controlled." The practice was to turn in the

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[5] In the Communist Party, the unit was the home base to which a member was assigned and paid dues (R. 5830). The chairman of the unit, known as a unit organizer, was contact man between the unit and the next higher echelon, the section (R. 683–684). The section organizer was in turn responsible to his district organizer (R. 727–728). In each region, the governing group was the District Committee. The district which included California was known as "District 13." Nationally the Party was governed by the Central or National Committee, of which a small policy-making group was known as the Politburo (R. 2409–2424).

In addition to units and sections, there were also "fractions" within each labor group which met as a Communist organization to discuss problems within the labor group in which the particular fraction functioned (R. 5900). A fraction meeting was held by Communist union members to plan an activity in a non-Communist meeting to follow (R. 1764). There were "Top Fractions" which existed in the San Francisco District Council of the Maritime Federation and in the California State C. I. O. as well as in the national union organizations (R. 5828–5829, 5834–5844, 5931).

old book and receive a new one. About the middle of January 1936, Schomaker gave new books to each Party member, including Bridges, at a Communist unit meeting (R. 869–870). Again in the winter of 1936, Schomaker received Bridges' old Communist Party book, and issued him a new one in January 1937 (R. 871).

Bridges' Communist Party book was made out in the name of "Harry Dorgan" (R. 885–886), Dorgan being his mother's maiden name. Dorgan thereafter became his Party name (R. 1236).

C. THE PARTICIPATION OF BRIDGES IN COMMUNIST ACTIVITIES DURING THE 1930's

After the recruitment of Bridges into the Communist Party, he became a member of the District Committee, and of the Bureau, the executive committee of the District Committee (R. 1236–1237). Bridges and petitioner Schmidt were also members of the waterfront section of the Communist Party in San Francisco (R. 5858). Schomaker and other government witnesses attended numerous Communist meetings at which Bridges and Schmidt actively participated (R. 894–905, 910–935, 937–941, 950–951, 1006–1007, 1341–1363, 1763–1764, 1911–1928, 2890–2892, 5849–5858, 5888–5894). The Government witness Lawrence Ross, who was county organizer for San Francisco County (R. 2854), testified that he heard Bridges give a talk at a closed meeting restricted to leading Communist Party members about the situa-

tion on the waterfront as it concerned the Communist Party (R. 2862–2869, 2886–2887). Bridges and Schmidt attended closed Communist Party meetings at which persons stood at the door to recognize the Communist members as they entered (R. 921–935, 2871–2879).

Moreover, Bridges' relations with the Maritime Federation of the Pacific and the C. I. O. were not limited to their general meetings and activities; he also was active in Communist "fraction" meetings which planned Communist strategy to be infiltrated into their operations (R. 5847–5856, 5865–5871, 5888–5891).

Two government witnesses, John Schomaker and Irene Patti Harris, described a meeting held at the home of Jack Shaw on Pine Street early in the fall of 1938 at which Bridges gave a speech. Bridges made a plea for the persons present to become members of the Communist Party and told the group that he was a member (R. 1697–1704). Mrs. Harris testified (R. 1704):

> Yes. That made a very impression [sic]. I was flabbergasted when I heard him say that, because he had been accused, and I had heard it denied. And when he made that statement, why, it made a very much impression on me [sic].

Schomaker also testified that petitioner Bridges on this occasion spoke about the international situation and the necessity of the workers joining a political party that would fight in the interest of

the workers, particularly in view of the rise of Fascism. Bridges "stated very emphatically that all workers who were interested in stopping these things should join the Communist Party, because he was a member of the Communist Party and he was there to fight such goings on" (R. 877–878).

D. THE COMMUNIST CENTRAL COMMITTEE

Three witnesses, Paul Crouch, Manning Johnson and Lawrence Ross, described the election of Bridges at the 1936 Communist Convention in New York to what was then the Central Committee of the Communist Party. Bridges was elected under the name of "Harry Rossi."[6] (R. 2080–2089, 2229–2233, 2355, 2351–2357, 2361, 2892–2895.)

Manning Johnson, who had held a number of posts in the Party, was elected to the National Committee in 1936 (R. 2074–2075, 2080–2083).[7]

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[6] This alias of "Rossi," applied to Harry Bridges, grew out of the 1934 general strike in San Francisco (R. 2236–2237). At that time, Sam Darcy reported to a meeting of the National or Central Committee, giving a detailed account of the general strike in San Francisco. In this report, Sam Darcy mentioned that "Comrade Bridges" had wielded more power than Mayor Rossi in San Francisco. Jay Peters, as a result of that, thereupon affixed the alias of "Comrade Rossi" to Bridges. Thereafter, whenever reports were given on activities in California by the leading organizers, he was referred to as "Rossi". Under the name of Rossi, his name was put on the list of the 1936 convention (R. 2239–2240).

[7] The National or Central Committee was comprised of the outstanding leaders in the Communist movement throughout the country, and its membership was selected on the basis of the particular district or type of industry from which

After his election, he met the other committee members, including Bridges, who went under the alias of "Rossi" (R. 2088). At one closed session, Stachel introduced Bridges to the National Committee, and Bridges received a big ovation (R. 2229, 2234). It was explained that Bridges henceforth would not be brought to meetings of the National Committee because of his strategic position in the labor movement on the Pacific coast, and because, if it became known that he was a member of the Communist Party, he would no longer be able to move and work in the Party interests (R. 2234). Paul Crouch testified this meeting of the new Central Committee was for the purpose of electing the Politburo of the Party (R. 2361).

Paul Crouch attended the 1938 national convention. The procedure at this time was different from that of 1936. Prior to the final election session, the Central Committee called a meeting of the district organizers, the editors, and a few top leaders of the Party, to discuss nominations and procedure at the convention. William Schneiderman proposed the name of Bridges, stating that while he was temperamental, he had made an important contribution. Schneiderman

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they came. The major emphasis was laid on persons from the basic or strategic or mass-production industries such as steel, mining, marine, packing, railroad and so forth. In 1936, there were about 50 members on the Committee. (R. 2078-2091.)

thought Bridges would contribute more on than off the Central Committee. At the end, Earl Browder, referring to Bridges, said "Comrade Derkin or Dargan" would be put on the Central Committee. Crouch voted for Bridges. At the convention, in reading the list of nominees, the speaker, Earl Browder, said, "The next person to go on the Central Committee is a well-known West Coast labor leader," but he did not mention Bridges' name. Crouch testified that "At that moment the entire convention burst into stormy applause". (R. 2358–2361.)

E. OTHER COMMUNIST ACTIVITY IN THE 1940'S

At the 1941 convention of the California State C. I. O., Crouch, who was then a member of the Bureau of District 13 (R. 2338), was told to see that Bridges carried out decisions of the Political Bureau of District 12, after June 22, 1941, when the Soviet Union was attacked by Germany. There had been a District Bureau meeting in Schneiderman's office on July 9, 1941, at which the policy of the Communist Party toward this issue was discussed, and also the reluctance of Bridges to go along with the Party line. Crouch had made a motion that if it became necessary to expel Bridges from the Party, this was not to be made public (R. 2723–2724, 2737). It was decided to prepare a resolution to be given by Bridges at the 1941 State C. I. O. convention to place him unequivocally on record in favor of the

then Communist policy of full support for the allies (R. 2738–2739). The resolution that was given by Bridges at the convention (Gov. Ex. 8; see R. 2367–2368) was prepared by Crouch during the two weeks preceding the convention, at the instructions of District 13 and William Schneiderman (R. 2362–2371). The resolution read by Bridges on the floor of the convention urged all-out support of the administration program of aid to the democracies in the war effort (R. 2367–2368).

Another Communist meeting was held in Rathborne's room in a San Francisco hotel in the summer of 1943 in connection with the California C. I. O. Executive Committee Meeting. Besides Rathborne and Wilson, another government witness, Bridges, Schneiderman, the Secretary of District 13 of the Communist Party, and others attended. A dispute between Rathborne and the Secretary of the I. L. W. U. was discussed. Schneiderman warned both that there were channels within the Communist Party to settle such difficulties, and that they should "get in line and stay in line" or they would be subject to strict Party discipline. (R. 3650–3652, 5880–5887.)

After 1944, in San Francisco, there was organized a special committee known as "God's Committee" which consisted of local San Francisco Communists who were connected with the San Francisco C. I. O. Council. Among its members

were Schneiderman, Rathborne, who was then secretary-treasurer of the California Council; government witness George Wilson, the secretary of the Bridges Victory Committee; and petitioner Robertson, an officer of the International Longshoremen's and Warehousemen's Union. On a number of occasions, Rathborne discussed the activities of this committee with Bridges and Schneiderman together. (R. 3640, 5834, 5842–5843, 5930–5933.)

The government witness George Wilson attended Communist meetings in 1944 and 1945 with petitioner Robertson, who was attached to the same Communist unit (R. 3647–3648). He also attended other meetings at which Bridges and Schmidt were present (R. 3649–3652).

SUMMARY OF ARGUMENT

I

With respect to petitioners' argument that the prosecution was barred by the three-year statute of limitations, it is the Government's position that the running of the statute was suspended by the Wartime Suspension of Limitations Act, and that apart from that Act the five-year limitation of the 1940 Nationality Act continued to apply by reason of the saving clause in the repeal section.

A. The Wartime Suspension Act applies to offenses involving fraud against the United States. This Court has interpreted the Act as applying only when the fraud is an essential element of the

crime as defined in the statute. *United States* v. *Noveck,* 271 U. S. 201. There is no question that all three offenses here in issue involve fraud within the ordinary meaning of the term.

Count II contains the allegation that petitioner Bridges knowingly made a false statement under oath in a naturalization case. The heart of this offense is fraud, since it involves a deceit practiced on the Government in order to acquire a very valuable status. In *Knauer* v. *United States,* 328 U. S. 654, this Court, in a revocation of naturalization case, treated a false oath as fraud. Moreover, the Congressional intent to treat false statements in such cases as fraud is clear. The fact that pecuniary loss to the United States was not involved does not remove the offense from the scope of the Suspension Act. The purpose and legislative history of the Act show that it was intended to apply to frauds generally. The authority of *Marzani* v. *United States,* 168 F. 2d 133 (C. A. D. C.), affirmed by an equally divided Court, 335 U. S. 895, 336 U. S. 922, is outweighed by *Miller* v. *United States,* 24 F. 2d 353 (C. A. 2), certiorari denied, 276 U. S. 638, and *United States* v. *Gottfried,* 165 F. 2d 360 (C. A. 2), certiorari denied, 333 U. S. 860.

Count I charges a conspiracy to defraud the United States and is based on the statutory provision referring to "conspiracy to defraud," rather than "conspiracy to commit an offense."

Under the statute, this is a distinct and separate offense. *Glasser* v. *United States*, 315 U. S. 60. Obviously a conspiracy to defraud is an offense involving fraud. Quite independent of the false statement offense of Count II, Count I involves fraud against the United States and falls within the statute. In fact, the conspiracy statute was selected by this Court in the *Noveck* case as an example of an offense falling within the Suspension Act.

As to Count III, aiding and assisting in obtaining a naturalization certificate by fraud, it is equally apparent that an offense involving fraud against the United States is charged. Since an aider or abettor is by statute a principal, there can be no question based on the degree of involvement.

B. Under the Nationality Act of 1940, a five-year statute of limitations applied to offenses charged in Counts II and III. When the provisions establishing criminal liability were repealed at the time of the enactment of the new Criminal Code, Section 21 of the statute effecting the revision contained a saving clause preserving all "rights and liabilities" under existing law. It is our contention, contrary to the holding of the court below and of the Court of Appeals for the Second Circuit in *United States* v. *Obermeier*, 186 F. 2d 243, that this saving clause preserved the five-year statute as to the offenses here involved.

Generally speaking, it has been the practice of Congress to keep old limitation clauses when it enacted codifications. This makes for convenience and certainty. Moreover, statutes, including statutes of limitation, are customarily given a prospective interpretation. *United States v. St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1. The particular saving clause in this case, and other clauses using similar language, have been interpreted to preserve the effect of statutory provisions which were not substantive in character. Since this Court has held that statutes of limitation really affect "rights and liabilities" (*United States v. Oppenheimer*, 242 U. S. 85), it is only reasonable to assume that in the revision of the Criminal Code the revisers intended to preserve existing limitations.

II

The second issue on which this Court granted certiorari was whether the present prosecution was barred by reason of previous proceedings dealing with the same subject matter. Petitioners assert that two prior deportation proceedings in 1938 and 1941 and the 1945 naturalization decree bar the present prosecution for perjury under the principles of *res judicata*, estoppel, or due process of law.

A. As to the deportation proceedings, the only fact findings in the 1941 proceedings were those of the examiner, approved by the Attorney Gen-

eral, to the effect that the petitioner Bridges had been affiliated with, and a member of, the Communist Party, and was therefore subject to deportation. The deportation order was countermanded by this Court in a habeas corpus proceeding. *Bridges* v. *Wixon*, 326 U. S. 135. But the grounds for granting the writ were that the Attorney General had adopted an improper definition of affiliation, and that Bridges had been denied a fair hearing by reason of the introduction of incompetent testimony. Thus there are no findings in that proceeding which could serve as *res judicata* or estoppel in the present proceeding.

The 1938 deportation proceeding decided only that it had not been established that Bridges was a member of the Communist Party as of the time of the proceeding. That is clearly not a finding that in 1945 he was not and had never been a Communist. Since the critical issue in the 1938 case is not the issue here, there is no basis for an estoppel by judgment even if it be assumed that that principle is as applicable to administrative as to judicial proceedings. It has been held, however, that *res judicata* and estoppel do not apply to some classes of immigration proceedings (*Pearson* v. *Williams*, 202 U. S. 281); and in view of the nature of deportation cases there is sound basis for refusing to apply the rule here so as to bar a court or jury from re-examining a matter

decided only administratively, particularly in view of the fact that the administrative agency involved does not apply the rule to successive proceedings before it.

B. As to the naturalization decree, the issue as to Bridges' Communist membership was not litigated in that proceeding, and was not decided by the court. Therefore, there is no room for collateral estoppel. *Commissioner* v. *Sunnen*, 333 U. S. 591. Moreover, the Government may not be precluded from prosecuting a witness for knowingly making a false statement because the perjury was successful and deceived the court before which it was perpetrated. Certainly the Government must be free to protect its own processes against fraud. *Knauer* v. *United States*, 328 U. S. 654.

C. As to the alleged violation of the Fifth Amendment resulting from successive proceedings, it should be pointed out that the second deportation proceeding resulted from a change in the substantive law. This Court has repeatedly held that Congress has full power to alter the law respecting the rights of aliens to remain here. *Harisiades* v. *Shaughnessy*, 342 U. S. 580. Following the second deportation proceeding, it was the petitioner, not the Government, who instituted the naturalization proceeding. If the petitioner gave false testimony in that proceeding (and the jury so found), certainly it was not only the right but the duty of the Government to bring

him to trial. Here there is no double jeopardy, no repetitive trial of Bridges for the same offense. Nor is there any doctrine in American law which grants a witness a license to commit perjury. *Cf. United States v. Williams*, 341 U. S. 58, 62.

ARGUMENT

I

THE PROSECUTION IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Petitioners' contention is that prosecution under all three counts of the indictment against them is barred by the three-year limitation provision of Section 3282 of the Criminal Code. 18 U. S. C. (Supp. V) 3282. Two different, and alternative, arguments are urged in opposition to this view. First, the Wartime Suspension of Limitations Act, 18 U. S. C. (Supp. V) 3287, suspended the running of the statute of limitations until December 31, 1949,[8] a date after the date of petitioners' indictment (May 25, 1949). Second, only as to counts II and III, the saving provision of the Act of June 25, 1948, revising Title 18, preserved the earlier five-year statute of limitations applicable to offenses under the nationality laws so that wholly apart from the Suspension Act the time did not expire until 1950.

[8] The President proclaimed the cessation of hostilities on December 31, 1946 (12 Fed. Reg. 1).

A. THE SUSPENSION ACT IS APPLICABLE

The applicability of the Wartime Suspension of Limitations Act in this case depends on whether the offenses with which petitioners, Bridges, Robertson, and Schmidt are charged are offenses "involving fraud or attempted fraud against the United States."

In terms, the Act provides:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, * * * shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

The first count of the indictment against petitioners charged them with conspiracy to defraud the United States by impairing, obstructing and defeating the proper administration of its naturalization laws; specifically, by having petitioner, Bridges, fraudulently petition for and obtain naturalization by falsely stating that he had never been a member of the Communist Party. It is based on Section 37 of the Criminal Code (18 U. S. C. [1946 ed.] 88), which provides, in relevant part, that "If two or more persons conspire * * * to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of

the conspiracy, each of the parties to such conspiracy shall be fined * * *." *Supra*, pp. 2–3.

The second count of the indictment charged Bridges, alone, with having willfully and knowingly testified falsely under oath as a witness in his naturalization proceeding that he was not and had never been a member of the Communist Party. This count was based on Section 346 (a) (1) of the Nationality Act of 1940, 54 Stat. 1137, 1163, 8 U. S. C. [1946] 746 (a) (1), which made it a felony "for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise * * * (1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship." *Supra*, p. 3.

The third count of the indictment charged that petitioners Schmidt and Robertson had willfully and knowingly encouraged, aided, advised and assisted Bridges to obtain, accept and receive a Certificate of Naturalization which was to be procured, and was procured by fraud, as these petitioners knew, which fraud consisted of false and fraudulent statements made by Bridges in his naturalization hearing to the effect that he had never been a member of the Communist Party. The count was based on Section 346 (a) (5) of the Nationality Act of 1940, 54 Stat. 1137, 1164, 8 U. S. C. [1946] 746 (a) (5), which made it a

felony " * * To encourage, aid, advise or assist any person not entitled thereto to obtain, accept, or receive any certificate of arrival, declaration of intention, certificate of naturalization, or certificate of citizenship, or other documentary evidence of naturalization or citizenship— a. Knowing the same to have been procured by fraud * * *." *Supra*, p. 4.

The question is, whether these offenses involve fraud against the United States. As to the first count of the indictment, surely, an offense under a statute which requires the proof of a specific intent to defraud the United States involves fraud against the United States.[9] It involves fraud because it says so, and it involves fraud because the crime, conspiracy to defraud the United States, necessarily requires proof of acts which, without respect to labels, amounts to such a fraud.

It would seem just as clear that the third count of the indictment involves fraud. For there, the offense is under a statute which requires proof that the defendants aided, advised or assisted a fraud. The involvement is a shade less direct than under the conspiracy statute but it is nevertheless plain that the offense involves fraud against the United States. A specific intent to

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[9] *United States* v. *Noveck*, 271 U. S. 201, moreover, states flatly that offenses under the general conspiracy statute "involve fraud" within the meaning of an earlier suspension provision. We shall discuss this case more fully later in this brief.

aid, advise, or assist another to defraud is by any reasonable standard a specific intent to defraud.

The offense charged in the second count, on analysis, also involves fraud. To lie knowingly in a naturalization proceeding is to attempt to deceive the United States with respect to the grant of a very valuable right, namely, citizenship. The fact that the end sought is a status rather than money or proprietary gain, should make no difference.[10] To attempt to gain such a benefit by deception clearly falls within the conventional notion of fraud.

Nonetheless, the petitioners contend that the offenses here in question do not involve fraud within the meaning of the suspension provision. They assert that fraud is not involved (1) unless an intent to defraud is specifically required in the statute defining the offense and (2) unless a pecuniary or proprietary fraud (or the "hurly-burly of war") is involved (Pet. Br. 19–20). They urge that no such specific intent to defraud is involved in the second count of the indictment here and that Counts I and III must stand or fall with Count II (Pet. Br. 34). They also argue that no pecuniary or proprietary fraud, or war crime, is involved in any of the cases (Pet. Br. 29).

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[10] Deceit in the attainment of the marital status is generally referred to as fraud. See, *e. g.*, D. C. Code 30–103; *Stone* v. *Stone*, 136 F. 2d 761 (C. A. D. C.).

We shall not take issue here with petitioners' first point, that the fraud referred to in the Suspension Act must be found as an essential element in the offense as defined in the statute rather than as an element in the crime as alleged in the indictment. As petitioners point out (Pet. Br. 22–23), that is the clear holding of this Court in *United States* v. *Noveck*, 271 U. S. 201, and *United States* v. *Scharton*, 285 U. S. 518, under earlier suspension statutes.[11] The court below, as well as the courts of appeals in the District of Columbia and in the Second Circuit have found that this same rule is applicable to the 1942 Suspension Act. *Marzani* v. *United States*, 168 F. 2d 133 (C. A. D. C.), affirmed, 335 U. S. 895, 336 U. S. 922; *United States* v. *Obermeier*, 186 F. 2d 243 (C. A. 2), certiorari denied, 340 U. S. 951.[12]

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[11] This position is not so clear in *United States* v. *McElvain*, 272 U. S. 633, where the Court looked through the statutory offense (conspiracy to defraud the United States) to the nature of the particular offense (defeating the collection of a tax).

[12] Although we do not ask the Supreme Court to overrule its position in *Noveck*, it might be noted that it would be more consistent with the original intent of Congress to examine into whether the particular offense alleged in an indictment involves fraud rather than to rely on the statutory definition of the offense, which of necessity is more general in its terms. It does not always make sense to make the suspension rest on the language of the statute. For example, many of the offenses previously defined in the Nationality Act of 1940 (8 U. S. C. 746) were codified in a single section in the Criminal Code (18 U. S. C. (Supp. V) 1425). The new section encompasses a group of offenses which are de-

1. The Suspension Act is applicable to Count II of the indictment

Without accepting petitioners' thesis that the applicability of the Suspension Act with respect to the conspiracy count (Count I), or the aiding and assisting count (Count III), is dependent upon its application to the substantive count (Count II), it may still be convenient to accept petitioners' order of presentation and discuss Count II first. Basically the petitioners present two arguments why the Suspension Act should not apply to Count II, namely (a) the statutory offense does not involve fraud and (b), even if it does involve fraud in a broad sense, it does not involve a pecuniary or war fraud which is necessary to bring the Suspension Act into play.

(*a*). *The offense of obtaining citizenship by means of a false statement involves fraud against the United States.* The offense here involved is defined in the statute as "knowingly to make a false statement under oath, either orally or in writing, in any case * * * relating to naturalization or citizenship" (*supra*, p. 3). In other words, it is made criminal to attempt to acquire citizenship on the basis of lies.

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fined by the term "contrary to law." Thus, under this particular section, some provisions previously specifically based on "frauds" are now swallowed up in the more general "contrary to law" provision. Under the rule established in the *Noreck* case, the suspension statute would no longer apply to these offenses.

Fraud is defined as "a false representation of a matter of fact * * * which deceives and is intended to deceive another * * *". Webster's *New International Dictionary* (2d ed., 1934) 1003.[13] The effect of false testimony in a naturalization case is to obtain or to attempt to obtain the benefits of citizenship to which a person is not entitled by means of deceit. The falsehoods not only interfere with the administration of the Nationality Act, but also result in the acquisition of a right to which the applicant is not entitled. Thus, such lies perpetrate a fraud against the United States. Cf. *Schwinn* v. *United States*, 112 F. 2d 74 (C. A. 9), affirmed, 311 U. S. 616; *United States* v. *Choy Kum*, 91 F. Supp. 769 (N. D. Calif.). The courts have consistently characterized falsehoods in proceedings under the naturalization laws as frauds. *Del Guercio* v. *Pupko*, 160 F. 2d 799 (C. A. 9); *Haruichi Yoshihara* v. *Carmichael*, 115 F. 2d 110 (C. A. 9); *United States ex rel. Lamp* v. *Corsi*, 61 F. 2d 964 (C. A. 2); *United States ex rel. Jankowski* v. *Shaughnessy*, 186 F. 2d 580 (C. A. 2); *Brenci* v. *United States*, 175 F. 2d 90 (C. A. 1).

[13] Cf. *Knauer* v. *United States*, 328 U. S. 654, 657: "Fraud connotes perjury, falsification, concealment, misrepresentation." See also Black's *Law Dictionary* (3d ed.) p. 813: "Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury."

Although this Court has not previously been called upon to analyze the nature of a false statement under the statutory provision here involved, it was called upon in *Knauer* v. *United States*, 328 U. S. 654, to appraise the nature of a false statement in a comparable situation. That case involved a proceeding under Section 338 of the Nationality Act of 1940 (8 U. S. C. (1946 ed.) 738) to revoke an order of naturalization on the ground of fraud, the fraud involved being the alleged false oath that the petitioner was attached to principles of the Constitution when he was in fact a thorough-going Nazi. The Court stated (328 U. S. at 671):

> Moreover, when an alien takes the oath with reservations or does not in good faith forswear loyalty and allegiance to the old country, the decree of naturalization is obtained by deceit. The proceeding itself is then founded on fraud. A fraud is perpetrated on the naturalization court.

See also *United States* v. *Saracino*, 43 F. 2d 76 (C. A. 3). If, for the purposes of denaturalization, a lie told in the course of naturalization proceedings constitutes a fraud against the United States, it is difficult to understand how a lie told in the proceedings is not a fraud within the meaning of the suspension provision. In each case, the emphasis is on the fact that the lie is for the purpose of obtaining benefits under the

naturalization laws to which the witness, or the person for whom he lies, is not entitled.[14]

Petitioners assert that the type of fraud here involved, if it is fraud, is fraud in a secondary sense as that description was used in *United States* v. *Cohn*, 270 U. S. 339 (Pet. Br. 36). In this respect, petitioners apparently seek to classify the offense here with the type of frauds which have as their sole basis interference with or obstruction of lawful governmental functions. *Haas* v. *Henkel*, 216 U. S. 462; *United States* v. *Gilliland*, 312 U. S. 86; *Curley* v. *United States*, 130 Fed. 1 (C. A. 1), certiorari denied, 195 U. S. 628. While there is an element of interference with Government functions in this case, it is by no means necessary to rest it upon that ground, for here the offense consists in obtaining or seeking to obtain from the United States Government a right which is valuable beyond price. It would

[14] The fact that lies told in a citizenship proceeding should be considered frauds for purposes of denaturalization was made clear in the House Report in its comments dealing with cancellation on grounds of fraud where it was stated in H. Rep. 1789, 59th Cong., 1st Sess., p. 2:

> The conditions that have been revealed by special investigations of the frauds committed against the naturalization laws render wholly unnecessary any argument upon the necessity at this time of fully exercising all the authority in naturalization matters conferred by the Constitution upon Congress. * * * The worst and most glaring frauds have consisted in perjury, false impersonation, and the sale and use of false and counterfeit certificates of naturalization.

be strange indeed if the acquisition of United States citizenship was considered any less valuable, any less real, than a monetary advantage.

It must be conceded that the Court of Appeals for the Second Circuit has held that the particular offense alleged in Count II does not involve fraud. *United States* v. *Obermeier*, 186 F. 2d 243, certiorari denied, 340 U. S. 951. That Court's reference to "perjury or false swearing" as the gist of the offense (186 F. 2d at 257) may indicate that it misinterpreted *United States* v. *Noveck* as requiring a holding that fraud is not involved when the crime involves those elements.[15] It is true that the offense charged in *United States* v. *Noveck* was perjury under Section 125 of the Criminal Code, the general perjury section now codified in 18 U. S. C. 1621. It was charged in the particular case that the defendant had committed perjury by making false statements in his income tax return, "for the purpose of defrauding the United States." The Suspension of Limitations Act there involved was the 1921 statute, 42 Stat. 220, which was similar to the statute here involved. In a brief opinion this Court held that the prosecution was barred by the statute since

[15] It is clear that this Court's recent observation in *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45, that the three-year statute of limitations was applicable to an indictment under former Section 35 (A) of the Criminal Code for a false statement made in an attempt to evade income taxes, was not a holding on that point. The point was neither raised nor presented for decision in that case.

the offense did not come within the provision relating to frauds against the United States because (271 U. S. at 203):

> * * * the alleged purpose to defraud the United States is not an element of the crime defined in § 125, on which the indictment is based. That allegation does not affect the charge; it need not be proved and may be rejected as mere surplusage. * * * The construction of §§ 125 and 1044 contended for by the Government divides perjury into two classes. It makes one include offenses having the elements specified in § 125 and the other to include those containing the further element of purpose to defraud the United States.

Thus the case may well stand for the proposition that the United States is not, under Section 125, necessarily the defrauded party since the statute covers perjury generally and perjury occurs in suits not involving the United States. The case does not hold that to give false testimony is not deceit or fraud.[16]

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[16] It is to be remarked that petitioners do not rely upon the fact that the statutory provision here involved (8 U. S. C. (1946 ed.) 746 (a) (1)) does not use the word "fraud". Presumably petitioners refrain from making this argument because of the adverse effect the converse of that argument would have on their claim that Counts I and III, where the offenses do use the word "fraud", are also not subject to the Suspension Act. It should be noted, however, that the district court in the Northern District of California, relying upon *United States* v. *Scharton*, 285 U. S. 518, recently held that the statute must refer to fraud against the United States

(*b*) *The Suspension of Limitations Act is not limited in application to pecuniary frauds or war frauds.* Petitioners devote an entire subsection of their brief to the proposition that the Suspension Act is limited in its application to frauds which are pecuniary in nature or which arise out of the war (Pet. Br. 29–34). In part, this argument is apparently based on the concept that the fraud in this case merely involves obstructing governmental functions as in *Haas* v. *Henkel*, 216 U. S. 462. As pointed out above, whether or not that type of activity is encompassed within the Suspension Act,[17] the fraud here

"in so many words". *United States* v. *Grainger*, on appeal, No. 634, 635, and 636, this Term. We respectfully refer this Court to our brief in that case for a discussion of this aspect of the problem. It should suffice here merely to refer to the decision of the Court of Appeals for the Second Circuit in *Weinhandler* v. *United States*, 20 F. 2d 359, at 361, where that court held that the use of the precise words was not essential on the authority of *Grin* v. *Shine*, 187 U. S. 181, 189.

[17] There is an indication in the *Noreck* case that this Court construed fraud broadly enough to include the "secondary sense" referred to in *United States* v. *Cohn*, 270 U. S. 339. In *Noreck* this Court said (271 U. S. at 204):

> Its [the language of the statute] purpose is to apply the six year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration.

The "Section 37" referred to was the conspiracy section of the Criminal Code (18 U. S. C. (1946 ed.) 88) and it was this very section which had been given the broad construction in *Haas* v. *Henkel*, 216 U. S. 462. The issue in that case was

involved is far more closely related to the usual type of fraud which is involved in acquiring a valuable right through deceit.

The language of the Suspension Act in referring to "* * * any offense (1) involving fraud or attempted fraud against the United States or any agency thereof *in any manner*" seems designed to include all manner of frauds. And aside from the language of the section, its basic reason for being is opposed to the limited con-

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whether certain indictments charging defendants with conspiracy to defraud the United States in fact charged an offense against the United States. The indictments alleged that the defendants had agreed that one of them should give to the others certain Agriculture Department data in advance of publication. The Court held the indictment good, observing (216 U.S. at 479–480) that it was

> * * * not essential that such a conspiracy should contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of Government. Assuming, as we have, * * * that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial and reasonably accurate, would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled.

struction urged by petitioners. The singling out of cases involving fraud for suspension of the statute of limitations obviously stemmed from the fact that fraud might not be discovered until a considerable time after the offense had been committed. The very nature of fraud is that it is a concealed offense which must be sought out. That factor is involved, whether the spoils of the fraud be cash or privileges. There would be no logic in drafting a statute to protect the Government from the effects of deceptive behavior and then limiting it to those cases where the deception could be measured in terms of dollar amounts. Such an approach ignores the underlying policy against deceit.

Petitioners have exercised commendable zeal in assembling a considerable body of legislative history in an attempt to support their position. However, the volume of this legislative history is in startling contrast to its pertinency to the issue here involved. What the references in the brief proper (Pet. Br. 30–31) and the page upon page of materials in the appendix (Pet. Appendix, pp. 11–27) add up to is that the Congressional committees and speakers cited frauds in war contracts as examples of offenses which should not be allowed to escape punishment during the excitement of war. It is not strange that Congress should have seized upon war contracts as an example of the type of situation they wished to

encompass within the suspension provision. But the mere selection of this example does not support the view that Congress intended to limit the statute to such cases. In fact, it is strange indeed that, if Congress had any such intent, it did not affirmatively express it. On the contrary both House and Senate Reports stated the objective of the Act in broad terms (H. Rep. No. 2051 and S. Rep. No. 1544, 77th Cong., 2d Sess.):

> During normal times the present 3-year statute of limitations may afford the Department of Justice sufficient time to investigate, discover, and gather evidence to prosecute frauds against the Government. The United States, however, is engaged in a gigantic war program. Huge sums of money are being expended for materials and equipment in order to carry on the war successfully. Although steps have been taken to prevent and to prosecute frauds against the Government, it is recognized that in the varied dealings opportunities will no doubt be presented for unscrupulous persons to defraud the Government or some agency. These frauds may be difficult to discover as is often true of this type of offense and many of them may not come to light for some time to come. The law-enforcement branch of the Government is also busily engaged in its many duties, including the enforcement of the espionage, sabotage, and other laws.

> Your committee is of the opinion that action should be taken at this time to extend the limitations statute so that frauds may be discovered and punished even after the termination of the present conflict, and to insure that the limitations statute will not operate, under the stress of present-day events, for the protection of those who would defraud or attempt to defraud the United States.[18]

Petitioners find support in *Marzani* v. *United States*, 168 F. 2d 133 (C. A. D. C.), affirmed, 335 U. S. 895, 336 U. S. 922. We urge that the case, in so far as it holds that the Suspension Act "does not apply to offenses in which defrauding the United States in a pecuniary way is not an essential ingredient," is in error and should not be followed.

As opposed to the holding in the *Marzani* case, there are two decisions of the Court of Appeals for the Second Circuit. The first of these is *Miller* v. *United States*, 24 F. 2d 353, certiorari denied, 276 U. S. 638, dealing with conspiracy to defraud the United States in the allowance of claims to property seized by the Alien Property Custodian. Although there was property in-

[18] No interference to the contrary can be drawn from Mrs. Rankin's failure to persuade Congress to adopt as a substitute for 3287 a provision suspending limitations provisions as to all crimes against the United States committed during the war. There is no inconsistency between hesitating to defer all prosecutions and singling out for special treatment crimes involving deception.

volved in the case, the allegations dealt with fraud resulting from depriving the United States of its right to the disinterested and conscientious services of its agents. The court stated, at page 359:

> The Attorney General and the Custodian had promised, under oath, to protect the rights of the government and to give it conscientious service. If the facts established a fraud, and the jury was so satisfied, and the government was deprived of any of these, there was dishonesty and false dealing, and it was cheated and defrauded.

The court then referred to this Court's opinion in *Hammerschmidt* v. *United States*, 265 U. S. 182, which gave a broad definition to fraud in connection with the construction of the False Claims Act.

The second case decided by the Second Circuit was *United States* v. *Gottfried*, 165 F. 2d 360, certiorari denied, 333 U. S. 860. In this case, the fraud involved was the obtaining through a false statement of a larger sugar ration than was permissible under the regulations of the Office of Price Administration. Funds and property of the United States were in no way involved. The petitioners attempt to distinguish that case from the present one on the grounds that the fraud involved was in the nature of a war fraud, and they seek for support in the opinion in Judge Hand's statement (165 F. 2d at 368) that he

understood the purpose of the statute was "not to let crimes pass unpunished which had been committed in the hurly-burly of war * * *" (Pet. Br. 33). It is very apparent, not only from Judge Hand's words but from the context in which they were written, that he was referring to the time when the fraud occurred rather than the nature of the offense (Pet. Br. 33–34).[19] Nor can petitioners find any support for their position in the language of this Court in *United States* v. *Smith*, 342 U. S. 225, where all of the Justices, whether in the majority or in the dissent, treat the pertinency of the period of hostilities to the suspension statute as a time factor rather than as determining the nature of the offense.

As to Count II, therefore, it appears that the statutory offense involved is one which, by the terms of the statute, involves fraud against the United States and one which is subject to the Suspension of Limitations Act.

2. The Suspension Act is applicable to Count I

Count I of the indictment alleges an offense under the conspiracy section of the Criminal

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[19] See also *Danebo Lumber Co.* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, 491 (C. A. 9), certiorari denied, 340 U. S. 830; *Furrow* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, 499–500 (C. A. 9), certiorari denied, 340 U. S. 830, where conspiracies to violate O. P. A. regulations in blackmarketing transactions invoking lumber were referred to as frauds against the United States, the statute of limitations on which would be suspended.

Code, which presently is 18 U. S. C. 371 and was formerly Section 37 (18 U. S. C. (1946 ed.) 88). The conspiracy in Count I is alleged to be unlawful under the portion of the section which makes it illegal to conspire *"to defraud the United States."* It should be noted that the same section also makes it illegal to conspire "to commit any offense against the United States." These are two distinct crimes, one of which requires proof of some separate statutory offense which the conspirators have joined together to violate, whereas the other does not require references to any other statutory offense at all. In *Glasser* v. *United States,* 315 U. S. 60, 66–67, this Court said:

> It is unnecessary to explore the merits of the argument that the indictment is defective on the ground that it charges a conspiracy to commit a substantive offense requiring concerted action, namely, bribery, because, "The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to * * * defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense." *United States* v. *Manton,* 107 F. 2d 834, 839.

To make this distinction clear, the present petitioners could have been charged with conspiring to make false statements in a naturalization case in violation of Section 746 (a) (1) of the Nationality Act of 1940, in which case the offense would have constituted a conspiracy to commit another crime against the United States. Here, however, the defendants were charged with conspiring to defraud the United States by falsely applying for citizenship for one of their number and in connection therewith making false statements under oath. The conspiracy to defraud was thus broader in terms than a mere conspiracy to make a false statement.

The reason for spelling out at such length what seems to be obvious is that petitioners frequently fall into confusion in their brief and appear to be arguing that the conspiracy count constituted merely a conspiracy to commit the substantive offense charged in Count II (Pet. Br. 25, 34). Had this been the fact, it is obvious from the terms of the Suspension Act itself that the conspiracy count would have been subject to the Suspension Act only if the substantive offense, which was the basis of the conspiracy, involved fraud. It is, of course, our contention that Count II in this case does involve fraud; but it also is our position that Count I is quite independent of Count II, and that, even if it should be held that

Count II does not involve an offense the limitation on which is subject to suspension, nevertheless Count I is not barred by the statute of limitations.

The principal difficulty with briefing this part of the case is that the answer seems so obvious. Here is a statute which makes it a crime to "conspire * * * to defraud the United States in any manner," almost the identical words of the Suspension Act, "fraud * * * against the United States * * * in any manner, whether by conspiracy or not * * *." Here is an allegation in the indictment, which was proved on trial, that the defendants had conspired to defraud the United States. If the words of the statute were used to convey their ordinary and usual meaning, this case must fall within the statute. As a matter of fact, in *United States* v. *Noveck*, 271 U. S. 201, this Court cited as an example of a statute involving fraud the very conspiracy statute which is here involved. Petitioners would discount this reference by reason of the fact that in a later case, *United States* v. *McElvain*, 272 U. S. 633, the Court held that not all conspiracies involve fraud (Pet. Br. 40). But the Court may there have had reference to the fact that conspiracies to commit *offenses* which do not involve fraud are not subject to suspension. The case itself went on the ground that, since the three-year

statute involved did not apply to internal revenue offenses, the suspension act was similarly inapplicable to conspiracies to commit such offenses. The opinion seems to assume, contrary to the fact, that the indictment was for a conspiracy to commit an offense rather than conspiracy to defraud. The court below, after careful analysis, found that the case was not authority for excluding Count I from the Suspension Act (R. 8374–8375).

On the other hand, conspiracies to defraud, rather than conspiracies to commit particular offenses, have been held to fall within the Suspension Act. The Court of Appeals for the Second Circuit, in holding that an indictment under the conspiracy provision was covered by the Suspension Act, stated in *United States* v. *Falter,* 23 F. 2d 420, 426, that:

> * * * the proviso [the 1921 suspension provision] applied to the case at bar admits of no question. * * * The fraud was neither an incident nor the purpose of the crime, as in *U. S.* v. *Noveck* * * *, nor an offense against the revenue laws, as in *U. S.* v. *McElvain* * * *. The conspiracy to defraud was the crime, and the crime consisted only in the fraudulent conspiracy.

In the following year, the same court held again that the suspension provision was applicable to a case arising under the general conspiracy statute. *Miller* v. *United States,* 24 F. 2d 353, 360. The court stated:

> A successful conspiracy, which defrauds the United States of its governmental rights or property, is an offense involving the defrauding of the United States, whether by conspiracy or not. *Hammerschmidt* v. *United States, supra; United States* v. *Owen et al.* (D. C.) 32 F. 534.

In addition, two recent Ninth Circuit decisions have stated that the wartime suspension provision is applicable to prevent the running of the statute of limitations against conspiracies to defraud the United States. See *Danebo Lumber Co.* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 489, 491, certiorari denied, 340 U. S. 830; *Furrow* v. *Koutsky-Brennan-Vana Co.*, 182 F. 2d 496, 499–500, certiorari denied, 340 U. S. 830.[20]

Petitioners envisage an attempt by the Department of Justice to extend statutes of limitations generally by drafting indictments under the conspiracy count, rather than under the substantive law provisions of the Criminal Code (Pet. Br. 45). This overlooks the fact that nothing would be availed in this respect by charging conspiracies

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[20] In the *Danebo* case, the court stated:

> Here is a felonious conspiracy to defraud the United States under the then section 37 of the Criminal Code * * *. The blackmarketing of lumber is sought to be concealed by deceiving the O. P. A. officers in the performance of their duties created by this war-time legislation. On this conspiracy the statute of limitations apparently has not yet expired, its running being tolled for three years by the Act of August 24, 1942, 56 Stat. 747, 18 U. S. C. A. § 590a [now § 3287] as amended.

to commit substantive offenses, rather than the substantive offenses themselves, since it is recognized that the fraud in such cases must inhere in the substantive offense. And, so far as charging "conspiracies to defraud" are concerned, that offense, as is pointed out above, is quite separate and apart from the substantive offenses defined in the Criminal Code. See *Glasser* v. *United States*, 315 U. S. 60. If the Department of Justice charges conspiracies to defraud, it will be bound to support those charges by the evidence; if it does, there is every reason why the Suspension Act should apply. Thus the conspiracy statute does not, and cannot, present an avenue for extending statutes of limitations beyond the period intended by Congress.

3. The Suspension Act is applicable to Count III of the indictment

The offense covered by Count III is aiding and assisting in obtaining a certificate of naturalization "knowing the same to have been procured by fraud." (8 U. S. C. (1946 ed.) 746 (a) (5).) As with Count I, petitioners assert that the application of the Suspension Act to this count must stand or fall upon its applicability to Count II (Pet. Br. 38). This is clearly without merit since here the statute involved does not even make any direct reference to the offense charged in Count II. As petitioners have so thoroughly demonstrated, it is the statutory offense, not the

indictment, which determines the applicability of the Suspension Act (Pet. Br. 20–24). Count III clearly stands on its own base. Petitioners seek to tie this count to Count II by pointing out that the fraud involved in the particular indictment is the false statement on which Count II is based (Pet. Br. 38). But on examination of the indictment, it is immediately apparent that Count III deals with the false statements of petitioners Schmidt and Robertson, and not the false statements by Bridges (R. 7–8). It is therefore apparent that not even the same facts underlie the two counts.

The involvement of "fraud" against the United States when considered with relation to aiding and assisting is not specifically spelled out in the Suspension Act, as it is with conspiracy, but it is if anything a more direct involvement since an aider or abettor was under the Criminal Code then in effect, as now, considered a principal. 18 U. S. C. (1946 ed.) 550, now 18 U. S. C. (Supp. V) 2. Therefore, if the obtaining of a certificate of naturalization by fraud is a fraud against the United States, then aiding or abetting in doing so falls in the same category.

Thus our argument for the application of the Suspension Act to Count III combines all the arguments heretofore urged with respect to Counts II and I. It is the same type of offense, the same kind of fraud against the United States, that is involved in Count II, but in addition Con-

gress has used in this case, as in the conspiracy statute, the very term "fraud."

It is true of course that statutes of limitations perform a very real service in the criminal law. But it is also true that an individual has no vested right in any specific statute of limitations and that Congress in 1942 had the perfect right to provide for suspension of limitations on crimes involving frauds until three years after the termination of hostilities. If one indulges in the fantasy that those who violate laws cold-bloodedly calculate that they will be safe if they can avoid prosecution for a particular statutory term, then one should equally assume that they add to the calculated risk the effect of suspension statutes during time of war. In this respect it should be noted that the Suspension Act was passed in 1942, and that the alleged fraudulent acts took place in 1945.

B. SECTION 21 OF THE ACT OF JUNE 25, 1948, REVISING THE CRIMINAL CODE, SAVED THE FIVE-YEAR STATUTE OF LIMITATIONS IN THE NATIONALITY ACT OF 1940 FOR OFFENSES HERE INVOLVED IN COUNTS II AND III

Section 346 of the Nationality Act of 1940 (subsections (a) (1) and (a) (5) of which form the basis, respectively, of the second and third counts of the present indictment) contained as subsection (g) the following limitations provision:

> (g) No person shall be prosecuted, tried, or punished for any crime arising under

> the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime.

The Act of June 25, 1948, revising the Criminal Code, contained the following provisions:

> SEC. 21. The sections or parts thereof of the Revised Statutes or Statutes at Large enumerated in the following schedule are hereby repealed. [Section 346 was listed.] Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.

Thus during the period when the offenses occurred (June to September, 1945), there was a five-year statute of limitations. The statutory provisions covering both the offenses and the statute of limitations applicable thereto were repealed by the Act revising the Criminal Code, effective September 1, 1948, subject to a clause preserving existing "rights and liabilities." The indictments were found in 1949. The question is: Did the saving clause apply to subsection (g), the limitations provision, so that the five-year limitation continued to be applicable to offense perpetrated prior to September 1948?

The district court concluded that the period of limitations set out in Section 346 (g) defined the limits of petitioners' "liability" for the violations with which they were charged and therefore that this prosecution was saved by Section 21 (R. 165–166). The court of appeals, after

first agreeing with this view (R. 8225–8229), amended its opinion to hold that the savings clause did not preserve liability under the repealed five-year limitations provision (R. 8364–8367). There are a number of reasons why we think the district court was right.

1. The basic purpose of the saving provision is to preserve the status quo on earlier offenses

It is a normal and proper practice in legislative revision to make provision for the preservation of rights and liabilities under repealed provisions. The purpose is obvious. The process of simplifying and clarifying the law would be extremely painful if subsequently enacted provisions were constantly intermingled with earlier provisions. The new provisions—particularly in a complete codification—contain their own pattern, which has no place in a medley of contradictory earlier provisions. For this reason, it is normally appropriate to leave the earlier provisions as they stand, and simply to permit the passage of time to make their unsatisfactory details no longer relevant.

In line with this policy, the prior revisions of the criminal laws of the United States have contained saving clauses which, in express language, saved prior statutes of limitations as to prior offenses.

Thus the Revised Statutes of 1874 contained two sections which read as follows:

SEC. 5598. All offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect, as if said repeal had not been made.

SEC. 5599. All acts of limitation, whether applicable to civil causes and proceedings, or to the prosecution of offenses, or for the recovery of penalties or forfeitures, embraced in said revision and covered by said repeal, shall not be affected thereby, but all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising, or acts done or committed prior to said repeal, may be commenced and prosecuted within the same time as if said repeal had not been made.

Two sections with essentially the same phraseology were included in the 1909 revision of the Criminal Code as Sections 343 and 344 (35 Stat. 1159).

A similar purpose had appeared in more limited revisions. Thus, in the various revisions of the Nationality Act in 1906, 1918, and 1940, it was provided that, for the purpose of the prosecution of all crimes against the naturalization laws committed prior to the effective date of each such act, "the existing naturalization laws shall remain in full force and effect" [21] thus preserving

[21] 34 Stat. 603, Sec. 25; 40 Stat. 542, 547, Sec. 2; 54 Stat. 1137, 1168, Sec. 347.

provisions dealing with limitations. Section 4 (d) of the Act of February 10, 1939, 53 Stat. 1a, codifying Title 26 as the Internal Revenue Code, specifically saved prior limitation periods as to prior offenses.

The far more cryptic language of the 1948 revision gives rise to the problem in this case. The position taken by petitioners on the basis of the decision in *United States* v. *Obermeier*, 186 F. 2d 243 (C. A. 2), certiorari denied, 340 U. S. 951, holding that the Section 21 savings provision did not preserve the five-year limitation period of the Nationality Act as to offenses under that statute before the revision, is that the absence of a similar specific clause relating to limitations in the 1948 revision means that it was the intention of Congress to have the shorter period apply retrospectively. It is the Government's position that the change in language represents merely a change in style of draftsmanship and that there was no intent in the 1948 revision to depart radically from the pattern of prior revisions of keeping the *status quo* for prior offenses as to all matters which, in a practical sense, go to the "right" or the "liability."

There can be no doubt that a statute of limitations in a practical sense does go to the right or liability. As Justice Holmes said in *United States* v. *Oppenheimer*, 242 U. S. 85, 87, in rejecting the Government's contention that a judgment for defendant in a criminal case could not

be *res judicata* if it was based on a statute of limitations, a judgment on that ground "goes to his liability as matter of substantive law and one judgment that he is free as matter of substantive law is as good as another. A plea of the statute of limitations is a plea to the merits." This is the practical meaning of "liability" and this is the way we think it was used in Section 21 of the 1948 act. Cf. *United States ex rel. Hassell* v. *Mathues*, 27 F. 2d 137 (E. D. Pa.); *People* v. *Driessen*, 178 Mich. 118, 114 N. W. 526.

2. Statutes of limitations are to be construed prospectively unless a contrary intent clearly appears

Because of the fact that there have generally been specific saving clauses as to statutes of limitations, there are few cases which on their facts relate directly to the specific factual situation here presented. Nevertheless, this Court has indicated the guideposts which would normally be applied in construing a general saving clause such as is here involved.

One such guidepost is the general rule, specifically applied to statutes of limitations, that legislation will be construed prospectively unless a contrary intent clearly appears. In *United States* v. *St. Louis, San Francisco & Texas Ry. Co.*, 270 U. S. 1, the Supreme Court, in holding that a statute of limitations did not bar a cause of action which had accrued before its enactment, said:

> That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this Court to statutes governing procedure, *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306; and specifically to the limitation of actions under another section of Transportation Act, 1920. *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co.*, 266 U. S. 435. There is nothing in the language of paragraph 3 of § 16, or in any other provision of the Act, or in its history, which requires us to hold that the three-year limitation applies, under any circumstances, to causes of action existing at the date of the Act.

And in *United States Fidelity & Guaranty Co.* v. *United States for the use of Struthers Wells Co.*, 209 U. S. 306, where it was contended that an amendment to an act relating only to procedure necessarily takes effect upon causes of action existing when the statute was passed, this Court said (at pp. 316–317):

> * * * If the limitation as to the district in which the suit upon the bond could be brought were to be regarded as simply matter of procedure (which we do not assert), we still think it is not to be construed as applying retrospectively. As it is only a question of intention we are not prepared to hold that the section is prospective to

> its operation in regard to all its other provisions, but retrospective in the one instance, as to the district in which the suit is to be commenced. Even matters of procedure are not necessarily retrospective in their operation in a statute, and we see no reason for holding that this statute, of but one section, should be split up in its construction, and one portion of it made applicable to cases already existing and other portions applicable only to the future.

In *Russell* v. *United States*, 278 U. S. 181, in considering the time limitation for suits in the Revenue Act of 1924, this Court said (at p. 188):

> Paragraph (e), (2), of § 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not "affect" an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive § 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

These decisions make it clear, we think, that the distinction for constitutional purposes between "right" and "remedy" in order to determine whether a change impairs a vested right is a different concept from the distinction between

"right and liabilities" and "procedure" in determining whether a change is prospective or retrospective. When interpreting the intent of Congress, and particularly saving clauses in general revisions, there may still be a difference between "rights and liabilities" and "procedure," but it is on a different basis from that involved in determining issues of constitutionality where the retrospective intent has clearly been shown.

There is a difference between "procedures" such as rules of evidence or order of proof, which may well be made applicable to cases already pending, and rules, however they are characterized, relating to time limitations on the institution of a prosecution. The presence or absence of the right to particular courtroom procedure, particular rules of evidence, particular rights to witnesses, have only an indirect effect on a person's ultimate liability.

The effect of a time limitation is quite otherwise. It applies or it does not. It is in this respect far more akin to provisions defining the elements of the crime. There is no basic difference on the conduct of the court, or in its impact on criminal administration, between a challenge to a conspiracy indictment on the ground that no intent to defraud is alleged and a challenge that the prosecution is barred by time. Cf. *United States* v. *Oppenheimer*, 242 U. S. 85. Limitations in a practical way truly "affect" the "right" and the "liability."

3. This Court and the Courts of Appeals have applied the language used in Section 21 to provisions other than those defining substantive rights

Beyond the application of general principles of retroactivity, the Government's view is also supported by judicial recognition of the applicability of language like that in Section 21 to preserve rights and liabilities under provisions which do not define substantive aspects of crimes. In *Hoiness* v. *United States*, 335 U. S. 297, this Court held that the "policy expressed * * * in R. S. § 954 * * *" was preserved by Section 39 of the act revising Title 28 (a saving clause identical with Section 21 with which we are here concerned). Yet Section 954, which provided that judgment on appeal should be given without respect to technical defects, could not by any standards be called a substantive "right" or "liability." The conclusion is clear, therefore, that this Court recognizes no such limitation on the language of the Section 21 saving provision.[22]

[22] *Hoiness*, in detail, was as follows: A District Court had entered an order dismissing an admiralty suit for want of jurisdiction, directing that the respondents have costs, and directing the submission of findings of fact and conclusions of law in accordance with this order. A short time later, it entered an order incorporating findings and conclusions and again reciting that the libel was dismissed. An appeal was taken from the latter order. The Court of Appeals dismissed this appeal, holding that the first order was the final order and that the later decree was not appealable. The Supreme Court concluded that, since the appeal was taken to the Court of Appeals within three months of either order, it was timely;

In *De La Rama Steamship Co.* v. *United States*, 344 U. S. 386, this Court recently rejected a contention by the Government that, although Section 109 of Title I, the general saving statute, operated to save the liability of the United States under the War Risk Insurance Act, then repealed, nonetheless, the provisions of that Act giving jurisdiction over such claims to the District Courts was not saved, and that therefore recourse to the Court of Claims was necessary. The Court stated (at p. 390):

> * * * But where the object of Congress was to destroy rights in the future while saving those which have accrued, to strike

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that although the petition for appeal referred only to the second order, the "defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in R. S. § 954, 28 U. S. C. (1946 ed.) § 777," which provided in part: "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it * * *."

The Court accepted the "policy" of this section to be to disregard niceties of form and to give judgment as the right of the cause should appear to it. The Court noted that after the dismissal of the appeal in the Court of Appeals, Section 954 was repealed by Section 39 of the act revising Title 28, which is identical with Section 21 of the act revising Title 18. But, it said, "the policy expressed in § 954 was preserved as respects cases pending at the time of the repeal, since the repealing statute provides that 'Any rights or liabilities now existing under such sections or parts thereof shall not be affected by this repeal.'" (335 U. S. at 300–301.)

> down enforcing provisions that have special relation to the accrued right and as such are part and parcel of it, is to mutilate that right and hence to defeat rather than further the legislative purpose. * * *

Thus, this Court has explicitly recognized the applicability of savings provisions in phraseology similar to that involved here, as to matters which are clearly not substantive rights or liabilities.

There are similar decisions in the Courts of Appeals. In *Hiatt* v. *Hilliard,* 180 F. 2d 453 (C. A. 5), the Court held that the method of computing time off for good behavior was governed by the statute in effect at the time the sentence was imposed, and that the prisoner was not entitled to have good time credited in accordance with the 1948 revision. Compare *Lovely* v. *United States,* 175 F. 2d 312 (C. A. 4), certiorari denied, 338 U. S. 834, holding that, where the punishment provision with respect to a crime was changed by the 1948 revision, Section 21 "saved" the earlier, more severe penalty as to an offense committed before the revision. See also *United States* v. *Kirby,* 176 F. 2d 101 (C. A. 2).

These recent decisions refute the proposition set forth in *United States* v. *Obermeier,* 186 F. 2d 243, 253 (C. A. 2), certiorari denied, 340 U. S. 951, that the decisions of this Court establish the proposition that Section 13 of the revised statutes, now 1 U. S. C. 109, "saves existing substantive rights and liabilities from repeal but does not preserve 'remedies' or 'procedure' prescribed in

the repealed statute." If the cases ever established such a general proposition, they have in effect been overruled by the cases discussed above.[23]

[23] In fact the cases cited established no such rule.

Great Northern Railway Co. v. *United States*, 208 U. S. 452, involved Section 10 of the Hepburn Act which provided that the amendments provided by that Act (relating to general procedure in cases for the Interstate Commerce Commission and means of enforcing its orders in the courts) should not affect causes then pending in the courts. The Court held that, since Section 10 spoke only of the *procedure* to be applied in pending cases, this evidenced no Congressional intent to cut off the right to prosecute for offenses committed prior to but prosecuted after enactment of the Hepburn Act. The right to prosecute, it held, was saved by the provisions of Section 13 of the Revised Statutes (now 1 U. S. C. 109). This is not the equivalent of saying that Section 13 had application only to substantive definitions of offenses.

Hertz v. *Woodman*, 218 U. S. 205, was cited merely because it said of the *Great Northern* case that the saving clause of the Hepburn Act applied only to "remedies and procedure," and therefore "not by implication in conflict with the general provision of Section 13, which saved penalties, forfeitures and liabilities" (at p. 218). But again this dictum is not the equivalent of saying that nothing which does not amount to a substantive definition of a crime can be considered a liability. The actual holding of the *Hertz* case was that a tax was imposed at the time of the death of a settler of a trust, so as to be saved by a repealing statute which preserved taxes theretofore imposed, even though, under the prior statute, the tax was not due and payable until one year from the date of death, by which time the repealing statute had become effective.

Hallowell v. *Commons*, 239 U. S. 506, held that an act withdrawing the jurisdiction of the United States Courts over certain Indian claims and restoring exclusive jurisdiction over those matters to the Secretary of Interior was to be

4. The language of the 1948 revision does not indicate a Congressional intent to have the statute of limitations operate retrospectively

As we have shown, under settled rules of statutory construction, and under the decisions of this Court, a saving clause which saved "rights and liabilities" as to prior offenses should, in the absence of a contrary intent, be construed to save limitations periods as to such prior offenses. The question thus comes down to whether the absence of a specific reference to limitations in the saving clause of the 1948 revision, in the light of the fact that specific clauses saving limitations were included in prior revisions, is such a clear indication of Congressional policy as to require departure from the general rules of construction.

The argument is that the initial enactment of Section 5599 dealing specifically with limitations, and the inclusion of a similar section in the 1909 revision of the Criminal Code, show that the general sections like R. S. 5598 were deemed in-

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applied retroactively. The opinion rests largely on the fact that the Court found such retroactive intent from the sweep of the language vesting authority in the Secretary a consideration which would be controlling as to any savings clause. The court did say that "the reference of the matter to the Secretary, unlike the changes with regard to suits upon bonds, takes away no substantive right but simply changes the tribunal that is to hear the case". But this amounts to no more than saying that the forum is not a matter which inures with the right, a conclusion with which this Court disagreed in the recent *De La Rama* case, *supra*.

sufficient to save limitations provisions. Hence, it is argued, the similar language of Section 21 must have similar effect.[24] We submit, however, that failure to follow the phraseology of earlier revisions has very little to do with the meaning of the 1948 revision. The customs of legislation have changed since 1874. Redundance is no longer thought necessary to insure that courts will properly give recognition to the obvious and straightforward meaning of words. The basic philosophy of the drafters of the 1948 revision was rather to simplify language and avoid redundancy. For example, the House Report on

[24] The *Obermeier* opinion also refers to the fact that in 1933, the general section was repealed as obsolete whereas 5599 was retained. This was because it was thought the repeal of the section which had specifically preserved the various limitations provisions which had barred civil war claims might open up the argument that there was no longer any period of limitations as to such claims. The Committee report on the section incorporated also the view expressed by Secretary of War Patrick J. Hurley that another provision, Section 3 of the 1933 act, was not adequate to assure the barring of civil war claims because that provision "refers only to 'rights' and 'liabilities' and not to remedies, recourse to which may be barred by limitation." See H. Rep. 1205, 72nd Cong., 2nd Sess. Out of an obvious abundance of caution, Congress retained Section 5599, codifying it as Section 110 of Title I. We submit, however, that in view of the far-fetched reasoning which gave rise to the initial fears, and the complexity which would have been involved in relying upon a 1933 act to save a repealed 1874 statute of limitations, this overabundance of caution can hardly be said to be an authoritative legal interpretation.

the bill which evolved into the 1948 revision stated (H. Rep. 304, 80th Cong., pp. 7, 8):

> By assigning to chapter 1 all general provisions and definitions it was possible to omit repetitive phrases common to many sections.
>
> * * * * *
>
> A clear and uniform style was an important aim of this revision. Verbose phrases were pruned, ambiguous terms rewritten, and archaic expressions eliminated. * * *

It is not likely that the revisers, working under such a philosophy, would use two sections to accomplish that which one could accomplish merely because other revisers had, in an excess of caution, resorted to redundance.[25]

It is difficult to believe that all three revisions in 1947 and 1948 (Titles 1, 18 and 28), by the use of the shortened phraseology that "rights or liabilities" under prior statutes should not be "affected," intended *sub silentio* radically to depart from the pattern of the prior revisions of keeping the *status quo* as to all matters which

[25] It should be noted that Section 2 of the Act of July 30, 1947, 61 Stat. 633, 640, enacting Title I into positive law uses language identical to that of Sec. 21 of Title 18 to preserve "rights and liabilities." Yet the miscellaneous collection of statutory provisions assembled in the 1940 editio of Title I, to which this saving clause refers, cannot in any conventional sense be described as principally "substantive." Similarly as noted above the saving clause of Title 28 is identical with the statute here involved.

in a practical way do affect the rights and liabilities. The notes to the Revision of Title 18 do indicate an intention to make some changes. In this connection the revisers noted with respect to Section 3282 of the new code that they saw no reason for having a limitations period for offenses against the naturalization laws different from that for offenses generally. But this does not indicate that they expected or intended their change of the limitations period to operate retroactively. In this connection, it is significant that the revisers made no provision and no mention of any time period in which offenses, which would be barred by the shorter three-year period but which had as much as two years longer to run under the old statute, would be prosecuted. Petitioners argue that the fact that the revision was not effective until three months after it was passed indicates that the intention was to give the government a period during which to take care of such prosecutions. But the 1909 revision of the Criminal Code, approved March 9, 1909, was not made effective until January 1, 1910, and yet, as noted above, periods of limitations as to prior offenses were specifically preserved. Three months is a short period of time in which to compress two years.

By the time of the 1948 Revision this Court had indicated in its decisions that the word "liability" in a saving clause should be applied in a simple, common-sense way. In *United States*

v. *Reisinger*, 128 U. S. 398, construing Section 13 of the Revised Statutes to subject a defendant to prosecution under a repealed statute, the Court indicated its notion of the scope of "liability" by the following language quoted from *United States* v. *Ulrici*, 28 Fed. Cas. p. 328, No. 16,594, 3 Dillon 532, 534 (128 U. S. at 403):

> * * * Moreover, any man using common language might say, and very properly, that Congress had subjected a party to a liability, and, if asked what liability, might reply, a liability to be imprisoned. This is a very general use of language, and surely it would not be understood as denoting a civil proceeding. I think, therefore, that this word "liability" is intended to cover every form of punishment to which a man subjects himself by violating the laws of the country.[26]

It had indicated in *Russell* v. *United States*, 278 U. S. 181 (see *supra*, p. 59) that the word "affect" in a savings clause related to the time of bringing suit. It had indicated in *United States Fidelity & Guaranty Co.* v. *United States*, 209 U. S. 306, 316–317 (see *supra*, pp. 58–59) that the use of a single section to deal with a wide variety of situations indicated a non-technical use

[26] See also *Quirk* v. *United States*, 161 F. 2d 138, 143 (C. A. 8): "The function of a saving clause is to preserve something from immediate interference. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 * * *." Cf. *Stillman* v. *United States*, 177 F. 2d 607, 614 (C. A. 9).

of language, and that such a single section would not be interpreted to result in a medley of prospective and retroactive applications. It had indicated that it regarded the period of limitations on criminal offenses as going to the liability as a matter of substantive law. *United States* v. *Oppenheimer*, 242 U. S. 85 (see *supra*, pp. 56–57).

In the light of all these decisions, revisers in 1947 and 1948 could well believe that a saving clause which provided briefly that "rights or liabilities" should not be "affected" was ample to accomplish the purpose of the more redundant language of previous revisions of preserving the *status quo* as to any matter which in a practical way affected the right or the liability under a prior statute.

If, instead of re-enacting the offenses created by the Nationality Act, the 1948 revision had repealed them completely, there is no doubt that Section 21, or in the alternative 1 U. S. C. 109 would have saved the liability to prosecution for offenses committed before the revision. And it certainly would not have been contended that the liability was saved without the limitations created by the statute which gave rise to the offense. We submit that the situation is no different because there has been a re-enactment instead of a repeal. The 1948 revision controls offenses committed after its effective date. For the period before that time, former rights and liabilities, with all the collateral aspects which in a practical sense

affect those rights and liabilities, are controlled by the statutes in effect when the offense was committed.

In the light of the general principle that statutes of limitations will be construed prospectively unless a contrary intent is clearly shown; that "rights or liabilities" as used in a saving clause have been interpreted as referring to more basis definitions; that the period of limitations for a criminal offense does in a very practical way affect the liability, we submit that the statute of limitations as to Nationality Act offenses was a part of the "liability" which, under Section 21 of the Act of June 25, 1948, was not "affected" by the revision as to prior offenses. Hence the five-year period of limitations in effect when the acts which form the bases of Counts II and III were committed governs those counts of the instant indictment, and the prosecution thereon was not barred, irrespective of the scope of the Suspension Act.

II

THE INDICTMENT IS NOT BARRED AS TO PETITIONER BRIDGES UNDER THE PRINCIPLES OF RES JUDICATA, ESTOPPEL, OR THE DUE PROCESS PROVISION OF THE FIFTH AMENDMENT [27]

Petitioners contend that the indictment and conviction of Bridges are barred under the prin-

[27] Although petitioners do not specifically acknowledge the limitation (but see Pet. Br. fn. 52), it is readily apparent that this issue arises only as to Bridges. Neither of the other two petitioners were parties to any of the prior pro-

ciples of *res judicata,* estoppel, or due process of law. Their argument is that two prior deportation proceedings, instituted in 1938 and 1941 respectively (the latter of which was before this Court in *Bridges* v. *Wixon,* 326 U. S. 135), represent binding adjudications of fact that Bridges was not in 1938, nor from the time of his entry until 1941, a member of the Communist Party, with the result that the government was precluded at this trial from offering any evidence to show that Bridges was a member of the Communist Party at those times (Pet. Br. 53). They further argue that the naturalization decree in 1945 was a binding adjudication that he was not a Communist up to the decree (Pet. Br. 54). It is the government's position that nothing in any of these proceedings is binding on the government on the issues involved in the present case and that the government was therefore free to offer at the trial any evidence which it had to show that Bridges in 1945 swore falsely when he stated under oath that he was not and had not been a member of the Communist Party.[28]

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ceedings and may claim no advantage from either the doctrine of res judicata, or collateral estoppel. 1 Freeman, *Judgments* (5th ed. 1925) Sec. 407.

[28] The contention that the previous deportation hearings precluded the present criminal action under the doctrine of *res judicata*, was first raised by motion to dismiss the indictment (R. 11), which was denied by the trial court (86 F. Supp. 922, 928). During the trial, counsel for Bridges moved to limit any evidence of Bridges' membership in the

Before discussing each of the prior proceedings and the effect of the decision in each, it should be noted that there is no basis whatsoever for application in this case of the principles of double jeopardy or *res judicata* in the strict sense of binding parties as to causes of action which have been litigated. The double jeopardy clause of the constitution is violated only if there is a second trial for the identical offense. *United States* v. *Williams,* 341 U. S. 58; *Pinkerton* v. *United States,* 328 U. S. 640, 644. There has been no previous criminal prosecution against Bridges, and, even if a deportation proceeding could be likened to a criminal trial, it is obvious that a trial in 1939 and 1941 could hardly have involved the same offense as that stemming from an act committed in 1945. Similarly *res judicata* in the sense of binding the parties "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered

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Communist Party to the period from June 1945 to the time of the naturalization hearing in August 1945, contending that the decision of this Court in *Bridges* v. *Wixon*, on June 18, 1945, decided any question of Communist membership before that date (R. 736–818), although this Court had of course been concerned only with the legality of the detention under a 1941 deportation order. The trial court, in a memorandum opinion on this point (87 F. Supp. 14), ruled that this Court had not finally passed on the issue of Bridges' membership in the Communist Party, and observed that the evidence of Communist membership was not declared insufficient as a matter of law.

for that purpose" applies only to suits "involving the same cause of action". *Commissioner* v. *Sunnen,* 333 U. S. 591, 597. A criminal prosecution for swearing falsely is obviously not the same cause of action as that involved in proceedings to determine whether Bridges was deportable or in a proceeding to determine whether he should be naturalized.

Thus, aside from the contention that the very bringing of the prosecution violated due process, a contention we discuss *infra,* page 89, the "res judicata" issue in this case is actually one of the application of the principle known as collateral estoppel, which applies "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Commissioner* v. *Sunnen,* 333 U. S. 591, 597–598; see also *Federal Trade Commission* v. *Motion Picture Advertising Co.,* 344 U. S. 392, 397–398; *United States* v. *Williams,* 341 U. S. 58, 63. Neither in the deportation proceedings nor the naturalization action was the issue of Bridges' membership in the Communist Party actually determined so as to preclude the government from relitigating that issue as to any point in time.

A. THERE WAS NO FINAL BINDING ADJUDICATION OF FACT IN THE DEPORTATION PROCEEDINGS

The first deportation proceeding against Bridges was instituted in March 1938, on the

ground that Bridges, an Australian national, was then a member of or affiliated with the Communist Party. Under the statute then in force, past membership or past affiliation was insufficient for deportation; the alien had to be found to be a member at the time the warrant issued. *Kessler* v. *Strecker,* 307 U. S. 22.[29] At the conclusion of the hearings, the examiner found that Bridges was neither a member of, nor affiliated with, the Communist Party. The Secretary of Labor sustained the examiner and dismissed the proceedings in January 1940.

By the Act of June 28, 1940,[30] Congress amended the statute to provide for deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter," a member of or affiliated with an organization of the character attributed to the Communist Party in the first proceeding. A second deportation proceeding was instituted against Bridges in 1941 under the amended statute on the ground that he had been a member of or affiliated with that organization. Another hearing was had before the inspector designated to conduct the hearings who found that the Communist Party of the United States was an organization of the character described in the statute,

[29] That decision was rendered before the hearings on the warrant against Bridges which were conducted from July to September 1939.

[30] 54 Stat. 673, 8 U. S. C. 137.

that the Marine Workers' Industrial Union was affiliated with the Communist Party and was an organization of the same character, and that after entering this country Harry Bridges had been affiliated with both organizations, and had been a member of the Communist Party. He recommended deportation. The case was heard by the Board of Immigration Appeals which found that Bridges had not been a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reversed the decision of the Board, and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Harry Bridges to be deported.

Bridges, after surrendering to the custody of the District Director of the Immigration and Naturalization Service, challenged the legality of his detention by a petition for a writ of habeas corpus in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of the Director. *Ex parte Bridges,* 49 F. Supp. 292. The Court of Appeals for the Ninth Circuit affirmed the judgment of the trial court. *Bridges* v. *Wixon,* 144 F. 2d 927. This Court reversed the judgment below on two grounds, neither of which went to the merits of the deportation order. *Bridges* v. *Wixon,* 326 U. S. 135. The first ground was that the hearing examiner and the Attorney

General had misconstrued the term "affiliation" as employed in the statute; the second that the hearing was unfair by virtue of the fact that unsworn statements of the government witness O'Neil were considered, not merely for impeachment purposes, but as affirmative evidence. This Court specifically declined to pass upon whether the evidence in addition to that which it held improperly received would in itself have sustained the finding of membership in the Party, stating that "Whether the finding would have been made on this record from the testimony of Lundeberg alone is wholly conjectural and highly speculative." 326 U. S. at p. 155.

Thus the decision in *Bridges* v. *Wixon* and the proceeding which was there under review are not final adjudications of any issue of fact. The decision of this Court is not a determination that Bridges had not been a member of the Communist Party, nor even a determination that the evidence then available was not sufficient to prove that he had been a member of the party. It was merely a determination that the hearing at which he had been found as a fact to have been a member of the Communist Party had not been properly conducted, and therefore was, in legal effect, no hearing at all. Obviously, such a conclusion to a habeas corpus proceeding is not a binding determination of any issue of fact. A discharge on habeas corpus for jurisdictional defects at the

trial does not preclude a re-trial of the issue of guilt. See *Collins* v. *Loisel*, 262 U. S. 426, 430; *Harris* v. *Biszkowicz*, 100 F. 2d 854, 856 (C. A. 8). In fact "no discharge by writ of *habeas corpus* will operate as a bar to further proceedings in the same cause, unless the inquiry on the petition for writ involves a full investigation into the merits of the case,—the guilt or innocence of the accused." *Morse* v. *United States*, 267 U. S. 80, 85. The net effect of this Court's decision in *Bridges* v. *Wixon* is that, for the purposes of collateral estoppel, the 1941 hearings are non-existent.[31]

The 1938 hearings did end in an administrative determination that, on the evidence presented, Bridges had not been shown to be a member of the Communist Party as of that time. Clearly this could, at the very most, be binding on the issue of membership as of that particular time. *Kessler* v. *Strecker*, 307 U. S. 22. This petitioners concede (Pet. Br. 53). Certainly it was not essential to this proceeding to prove Communist

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[31] Petitioners make a brave attempt to save their point by arguing that this Court's order in *Bridges* v. *Wixon* amounted to a finding that without O'Neil's testimony there was no evidence to sustain the order of deportation (Pet. Br. 66). But the reference in the opinion to the receipt of incompetent evidence not being by itself ground for granting *habeas corpus*, on which petitioners rely, was directly related to the fact that there was not merely the receipt of incompetent evidence, but the absence of a fair hearing. 326 U. S. at 156.

membership as of that time in 1938. Bridges had sworn that he was at no time a member of the Communist Party (R. 138) and membership at any time before or after 1938 would have been sufficient to support the indictment. Therefore even if the prior finding is treated as the equivalent of an order by a court of competent jurisdiction, it would not be a bar to this proceeding.

Petitioners now contend that certain evidence bearing upon membership at the particular time involved should have been excluded from the present trial and that the jury should have been instructed to accept the prior determination for the period to which it applied (Pet. Br. 54). While we shall point out that no error was committed in refusing to accept the prior findings as binding, we should not overlook the fact that the issue as now raised is not properly before this Court on the present review. The issue raised in the petition was whether the prosecution was barred and that is one of the two issues to which the grant of certiorari was specifically limited by order of this Court (R. 8437). It is quite a different question to appraise the effect of evidence which was admitted[32] and to examine the instruction to the jury. This was not under-

[32] Even if excludible on the direct issue of membership in 1938, the evidence might have been admitted anyway to prove a continuing relationship which would support a finding of later membership.

taken by the court below and should not be considered here.

We turn now to a consideration of whether, in any event, findings by the Secretary of Labor in a deportation proceeding should be held binding on the Government in a subsequent criminal trial. This Court has observed that "* * * the differences in origin and function between administrative bodies and courts 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts'." *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248, 253; *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 143. In the *Wallace Corporation* case the contention was made that the National Labor Board could not, after having reached a determination in one proceeding, reconsider the evidence to reach a different result in a second proceeding. This Court in rejecting this contention, said (*ibid.,* p. 253):

> We cannot, by incorporating the judicial concept of estoppel into its procedure, render the Board powerless to prevent an obvious frustration of the Act's purposes.

See also *United States* v. *Stone & Downer Co.,* 274 U. S. 225, where this Court refused to extend the rule of collateral estoppel to decisions of the Court of Customs Appeals on determinations of

fact in duty classifications.[33] In that case the Court gave weight to the factor that the agency's own rules did not accord binding effect to prior findings. In this respect it should be noted that in the second deportation proceeding the Attorney General specifically refused to treat the prior proceeding as *res judicata*, stating that the doctrine was inapplicable. See *In re Harry Bridges* before the Attorney General in Deportation Proceedings (May 28, 1942, p. 30).

The lines which distinguish those administrative actions which are deemed conclusive from those which are not have never been precisely drawn.

[33] Some lower courts have similarly refused to extend the rule of *res judicata* and collateral estoppel to administrative proceedings on similar grounds. *Churchill Tabernacle* v. *Federal Communications Commission*, 160 F. 2d 244, 246 (C. A. D. C.) (proceedings of the Federal Communications Commission); *Home Loan Bank Board* v. *Mallonee*, 196 F. 2d 336, 389 (C. A. 9) (proceedings of the Home Loan Bank Board); *Grandview Dairy* v. *Jones*, 157 F. 2d 5, 9 (C. A. 2), certiorari denied, 329 U. S. 787 (decision of War Food Administrator); *Spencer* v. *Railroad Retirement Board*, 166 F. 2d 342, 343 (C. A. 3); *United States* v. *La Societe Francaise De Bien. Mut.*, 152 F. 2d 243, 246 (C. A. 9), certiorari denied, 327 U. S. 793 (decision of Commissioner of Internal Revenue); *National Rifle Association of America* v. *Young*, 134 F. 2d 524 (C. A. D. C.) (D. C. Unemployment Compensation Board). It has been held that an administrative agency, charged with the protection of the public interest, is not even precluded from taking appropriate action to rectify past mistakes, much less from reexamining a new complaint based on new evidence. *National Labor Relations Board* v. *Baltimore T. Co.*, 140 F. 2d 51, 54–55 (C. A. 4), certiorari denied, 321 U. S. 795, and cases cited.

See Davis, *Administrative Law*, pp. 563–613; Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 Wisconsin Law Rev. 5–42, 198–235. It is unnecessary to try to draw them here. For purposes of this case, it is sufficient to note that deportation hearings have never been considered to work an estoppel against proceedings of a similar character, and therefore *a fortiori* not against a criminal prosecution, *Wong Chow Gin* v. *Cahill*, 79 F. 2d 854, 857 (C. A. 9); *Flynn ex rel Ham Loy Wong* v. *Ward*, 95 F. 2d 742 (C. A. 1).[34] The political character of the issue, the executive nature of the proceeding and the public interest involved all lead to the conclusion that deportation hearings are the type of administrative action in which the judicial principles of *res judicata* and collateral estoppel have no place.

As this Court pointed out in *Harisiades* v. *Shaughnessy*, 342 U. S. at 589, "such matters [as the deportation of aliens] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." See also *Fong Yue Ting* v. *United States*, 149 U. S. 698, 731. The power to expel aliens may be exercised entirely through executive

[34] It should be noted that the three dissenting judges in *Bridges* v. *Wixon* thought the order of deportation after the 1941 hearings should be sustained against the contention in that case that the 1938 hearings were *res judicata* on the issue of membership in the Communist Party.

officers, and their findings are not subject to direct review in the courts. *Heikkila* v. *Barber,* 345 U. S. 229; *Carlson* v. *Landon,* 342 U. S. 524, 534. Since the deportation findings are not subject to judicial ratification they cannot constitute *stare decisis,* and have none of the other attributes of a judgment rendered by a court. The finding of an examiner in a deportation proceeding is "* * * not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority," *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206, 217.

A far closer analogy to deportation proceedings than the proceedings of the United States Tax Court on which petitioners' argument is partly based (Pet. Br. 58) was before this Court in *Pearson* v. *Williams,* 202 U. S. 281, where this Court held that the decision of a Board of Special Inquiry to admit an alien, is not *res judicata* in a subsequent proceeding, and that the matter may be later reopened and the alien excluded on the same grounds as those which were passed upon in the first instance. This Court, speaking through Mr. Justice Holmes said (pp. 284–285):

> * * * The board is an instrument of the executive power, not a court. It is made up, as we have mentioned, of the immigant officials in the service, subordinates of the Commissioner of Immigration, whose duties are declared to be administrative by § 23.

> Decisions of a similar type long have been recognized as decisions of the executive department, and cannot constitute *res judicata* in a technical sense.

The authority to deport is a continuing one and is not terminated by its exercise on one occasion. Cogent reasons for deportation may be revealed by new evidence which was not passed on in a previous proceeding because of its unavailability. The important political function of determining the right of an alien to remain in the United States cannot be hampered by a prior determination on different evidence. Cf. *Wallace Corp.* v. *National Labor Relations Board, supra; Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152.

If a decision rendered in a deportation proceeding is not *res judicata* in a subsequent proceeding of the same kind, it follows that such a determination is not *res judicata* in a later judicial proceeding, especially where new evidence is introduced. There is indeed considerable question whether any administrative action unreviewed by judicial authority is binding on a court. *Sekov Corp.* v. *United States*, 139 F. 2d 197 (C. A. 5); *Segal* v. *Travelers Insurance Co.*, 94 F. Supp. 123 (D. D. C.); *contra, United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (C. A. 7). Certainly, we submit, it should not be binding in a criminal prosecution. The determination of issues of fact in a criminal case is a function for

the jury. Clearly no decision by an administrative official against an alien could have binding effect in view of the different standard of proof required for conviction for a crime. On the theory that estoppel by judgment must be mutual (*Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 127; *Keokuk and Western R. Co.* v. *Missouri*, 152 U. S. 301, 317), this alone would bar application of the principle of estoppel. But beyond that, we submit that no administrative decision should take away from a jury its function of determining guilt as well as innocence on the basis of any evidence relevant to the issue to be decided.

B. THE NATURALIZATION DECREE IN 1945 IS NOT CONCLUSIVE OF ANY ISSUES IN THE PRESENT PROCEEDING

Petitioners assert that the naturalization decree in 1945 conclusively determined that Bridges was not a Communist at any time during the entire period covered by the indictment (Pet. Br. 54). In order for this to be so, the issue as to whether Bridges was a Communist from 1933 to 1945 (the period covered by the indictment) must have been litigated in the naturalization proceeding and decided by the court in issuing the naturalization order. *Cromwell* v. *County of Sac*, 94 U. S. 351; *Commissioner* v. *Sunnen*, 333 U. S. 591, 598; Scott, *Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1, 5.[35] Neither of these conditions prevails.

[35] If an issue is not contested in a particular case, a finding on it, even though necessary to the judgment, will not be

The record makes it abundantly clear that the Government did not litigate the issue of Bridges' Communist membership in the naturalization proceedings (R. 479, 492).[36] Aside from the questions addressed to Bridges himself as to his membership (R. 138), the answers to which form the basis for this prosecution, the Government made no further inquiry with respect to his membership in the Communist Party and did not seek to controvert his testimony.[37]

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binding in a later case. A party is not obligated to defend a position in the first case at the risk of abandoning it forever. For reasons wholly extraneous to the merits of his position he may wish not to contest the issue and he is not forced to do so at the risk of losing it. This is one of the differences between *res judicata* and collateral estoppel.

[36] Lloyd H. Garner, the hearing examiner who conducted the preliminary examination, and represented the Government in Bridges' naturalization proceeding, testified as a Government witness on the trial (R. 466–467). At the time of the preliminary examination he had recommended that an investigation be made of the loyalty and attachment to the Constitution of Bridges (R. 479, 491, 536). He heard nothing further from the investigation before the subsequent court hearing (R. 492).

At the time of the naturalization proceeding in court, he was instructed merely to present the facts to the court, and not to put in any objection to the petition for citizenship (R. 479, 492). He ascertained that it had been determined that the Government did not have sufficient evidence at that time to show that Bridges was a member of the Communist Party (R. 529).

[37] Garner did present "for what it [was] worth" an affidavit signed by a former wife of Bridges, accusing him of being

In the second place, the decree of naturalization itself cannot be interpreted as including a determination on the issue of membership in the Communist Party. Certainly it does not do so explicitly (R. 552–553), and there is no ground whatsoever for an assertion that there was an implicit finding of absence of membership. Nothing in the Nationality Act of 1940, which controlled at the time of the decree, specifically made naturalization dependent upon the absence of past membership in the Communist Party (8 U. S. C. (1946 ed.) 701–741). At most, the issue of membership might have been considered by the court as pertinent to the determination of whether the applicant was then, and had been for the five years preceding, attached to the principles of the Constitution (8 U. S. C. (1946 ed.) 707), and of whether he was, or during the past ten years had been, a member of an organization advocating the overthrow of the Government by force or violence (8 U. S. C. (1946 ed.) 705). But in view of this Court's recent decision in *Schneiderman* v. *United States*, 320 U. S. 118, it is by no means clear that mere membership would have been considered by the court at that time as a bar to naturalization. In any event, in view

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a Communist, which the court refused to admit in evidence (R. 139). This affidavit had come into Garner's possession the morning of the hearing, and into the possession of the Department of Immigration and Naturalization the Friday before (R. 514). Aside from this document, Garner had no other evidence to present to the court (R. 515).

of the time difference, petitioners' claim that the decree was a bar to the present prosecution is very clearly without support.[38]

In the third place, the Government cannot be precluded from a prosecution for knowingly making a false statement under oath by reason of the fact that the perjury was successful and deceived the court before which it was perpetrated. It would indeed be an odd application of the principle of *res judicata* to bar a court from protecting the integrity of its own proceedings on the ground that the final order in those proceedings precludes a further inquiry, criminal or otherwise, as to whether the legal processes had been abused. There can be no question of the power of the courts to undo a decree which has been reached through fraud. *Knauer* v. *United States*, 328 U. S. 654; *Maney* v. *United States*, 278 U. S. 17, 23; *Tutun* v. *United States*, 270 U. S. 568, 578; *Johannessen* v. *United States*, 225 U. S. 227, 240–241. See also *Hazel-Atlas Co.* v. *Hartford Co.*, 322 U. S. 238, 246. If, through misrepresentation or deceit, the applicant for naturalization conceals the true facts, and the naturalization court is thereby precluded from considering them, manifestly such issues are not merged in the naturalization decree. Certainly the issue of

[38] This does not mean that the question and answer involved in the present proceeding were not material. This issue was raised before the court below on appeal and disposed of briefly but cogently (R. 8390, 8391). It is not an issue here.

fraud could not in any sense be considered one of the "* * * matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Commissioner* v. *Sunnen, supra* (333 U. S. 591, 598).

Just as the certificate of naturalization may be canceled on a showing of fraud and illegality in its procurement, so the parallel criminal sanctions under the Nationality Act may be imposed for the perpetration of the same fraud, specifically for the false swearing in the case at bar. Cf. *Klapprott* v. *United States*, 335 U. S. 601, 610 (opinion of Mr. Justice Black). The issue of fraud, specifically the false swearing by which the certificate of naturalization and the attendant rights of citizenship were obtained, is no more immune from examination in this criminal proceeding, than it would be in a separate cancelation proceeding. The decree of naturalization no more bars a prosecution for false swearing than an acquittal for a substantive offense bars a prosecution for perjury. Cf. *United States* v. *Williams*, 341 U. S. 58. Whenever a fraud on the court is discovered before the statute of limitations has run, such fraud can and should be prosecuted.

C. THE INDICTMENT WAS NOT BARRED BY THE FIFTH AMENDMENT

Petitioners argue that repetitious proceedings against an individual on the same charge violate the Fifth Amendment, so that the mere bringing

of this prosecution violates due process. This is really another method of stating the *res judicata* argument with constitutional overtones. Clearly the doctrine of *res judicata* is not itself constitutional in nature, but is subject to modification to meet the needs of particular situations. Cf. *United States* v. *Stone & Downer Co.*, 274 U. S. 225. In any event, the argument has no relation to the facts of this case. As we have shown, the only time the truth of petitioner's 1945 oath was in issue was in this proceeding.

There has been no repetitious litigation in any sense. True, there were two deportation hearings, but the second was brought under a changed statute which broadened the basis of deportability from membership in a prescribed organization at a particular moment to membership at any time after entry. It has long been held that an alien has no vested right to remain in this country and that the rules for deportation may be changed. In *Harisiades* v. *Shaughnessy*, 342 U. S. 580, this Court stated at pp. 586–588:

> Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.

> * * * So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.
>
> That aliens remain vulnerable to expulsion after long residence is a practice that bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

When the second deportation case terminated inconclusively, Bridges himself, not the Government, instituted the third "litigation," when he applied for naturalization. In that uncontested "litigation," he and the other petitioners swore falsely. It is absurd to argue that it is somehow unfair for the Government to seek to punish Bridges when it came into possession of facts which showed that the oath which he voluntarily took in 1945 was untrue and a fraud on the court. Clearly the Government can prosecute an individual each time he commits a crime separate and distinct from any other for which he has been tried. Clearly it can, in such proceeding, offer any evidence it has to prove such crime unless an issue has been adjudicated in such a way as to have acquired judicial finality irrespective of reality. Due process does not require that fraud and false swearing shall go unpunished. Cf. *United States* v. *Williams*, 341 U. S. 58, 62.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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